ILLUSTRATIVE CASES

IN

PERSONALTY.

BY

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PREFACE.

THESE "Illustrative Cases in Personalty" have been selected for use in the class-room in connection with my lectures upon that subject. They are not "Leading," but "Illustrative" cases; and hence I have made the selection almost entirely from the decisions of our American courts. Nor does this compilation pretend to cover the whole subject; but only a part even of what the table of contents includes. Cases illustrating how title to personalty may be acquired and lost are those most helpful in my work at the present time, and consequently they have been selected. It is proposed to add other cases until the entire subject is covered.

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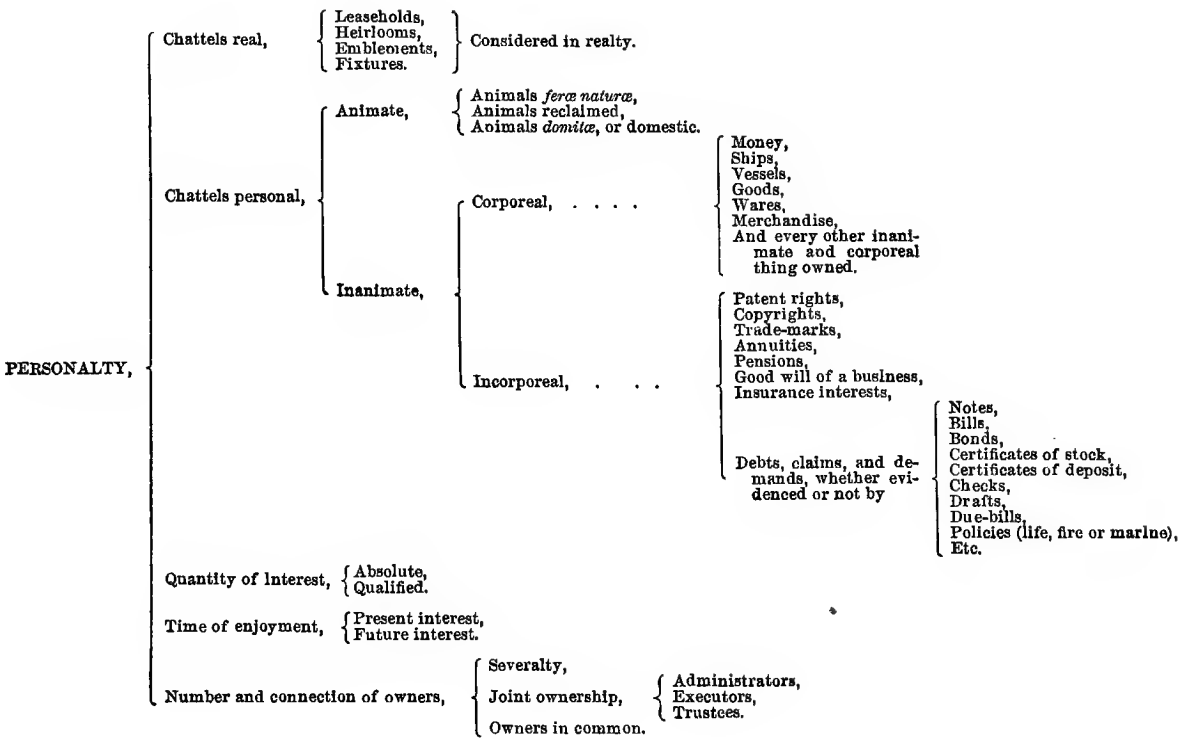
PERSONALTY,
Chattels real,
Leaseholds,
Heirlooms,
Emblements,
Fixtures.
Considered in realty.
Chattels personal,
Animate,
Animals ferœ naturæ,
Animals reclaimed,
Animals domitæ, or domestic.
Inanimate,
Corporeal, ...
Money,
Ships,
Vessels,
Goods,
Wares,
Merchandise,
And every other inanimate and corporeal thing owned.
Incorporeal, . . .
Patent rights,
Copyrights,
Trade-marks,
Annuities,
Pensions,
Good will of a business,
Insurance interests,
Debts, claims, and demands, whether evidenced or not by
Notes,
Bills,
Bonds,
Certificates of stock,
Certificates of deposit,
Checks,
Drafts,
Due-bills,
Policies (life, fire or marine),
Etc.
Quantity of interest,
Absolute,
Qualified.
Time of enjoyment,
Present interest,
Future interest.
Number and connection of owners,
Severalty,
Joint ownership,
Administrators,
Executors,
Trustees.
Owners in common.

- MEANS OF ACQUIRING AND LOSING TITLE TO PERSONAL PROPERTY,
  - 1. Occupancy,
    - 1. Elements,
      - Air,
      - Light,
      - Water.
    - 2. Animals,
      - Domestic,
      - *Ferœ Naturæ.*
    - 3. Lost and abandoned property,
      - EXCEPTIONS:—
        1. Waifs,
        2. Estrays,
        3. Treasure trove,
        4. Wrecks.
    - 4. Emblements,
    - 5. Accession,
    - 6. Confusion of goods,
    - 7. Invention,
    - 8. Literary compositions,
    - 9. Goods of aliens.
  - 2. Prerogative,
  - 3. Forfeiture,
  - 4. Custom,
  - 5. Succession,
  - 6. Marriage,
  - 7. Judgment,
  - 8. Gift,
  - 9. Contract,
    - 1. By sale or exchange,
    - 2. By bailment,
      - *Depositum,*
      - *Mandatum,*
      - *Commodatum,*
      - *Pignori acceptum,*
      - *Locatium.*
    - 3. By hiring and borrowing,
    - 4. By debt.
  - 10. Bankruptcy,
  - 11. Testament,
  - 12. Administration.

TABLE OF CASES.

CASES

ON

PERSONAL PROPERTY.

A qualified property "may subsist in the very elements of fire or light, or air, and of water." 2 Blackstone's Comm. 395.

I.

LIGHT.

ROBESON *v.* PITTENGER.

Court of Chancery of New Jersey, 1838.

2 N. J. Eq. 57.

THE CHANCELLOR. The object of this bill is to restrain the defendant from obstructing the light and air of a building belonging to the complainants. When the bill was presented, I granted the injunction with much reluctance, *without notice*; and I did so from the pressing character of the case, as the defendant was actually at work erecting the very obstruction complained of. I am now furnished with the briefs of the counsel of the respective parties, on a motion to dissolve the injunction upon the case made by the bill, and shall consider the same without prejudice, as if the propriety of the interference of the Court was now for the first time considered. I am not aware that this question has ever been decided in New Jersey, and it has caused me some anxiety to determine, not so much what views have been taken by other Judges and in other countries, of the question, but what should be the course of decision in this State, and particularly in a country under a rapidly increasing state of improvement. It would seem

unreasonable, that in those places where land is cheap, and the country thinly settled, a party, after being permitted to build his house and place his windows on the side adjoining the open field of another man, and especially after so long a possession as to presume a grant for that purpose, should have them obstructed by the erection of a wall or another building, when perhaps a little accommodation, by placing the new building a few feet further off, might work no injury to anybody; and yet in populous cities, where land is very valuable, and it is the constant practice to place buildings side by side, the enforcement of the same rule might work great inconvenience and injustice. The difficulty, therefore, is to lay down one rule for all cases. Nor will it do to leave all parties to their remedy at law. That would be shutting up the doors of a court of equity, when the exercise of its legitimate powers is most needed. Cases might arise where damages would be no adequate compensation for the injury sustained, and the party unable to respond in damages at all.

The cases in the English Courts are numerous in which damages at law have been recovered for obstructing lights, and where injunctions have been issued to prevent such obstructions. The law is there well settled, and of long standing. In 1 Levinz' Rep. 122, the case of Palmer *v.* Fletcher, there is an early and important decision on this subject. This was a case at law. A man built a house on his own lands, and then sold the house to one man, and the land adjoining to another, who obstructed the windows of the house by piles of timber. This house had been recently built, yet the action was sustained. The Judges differed as to what would have been the result had the man sold the vacant lot first, seeing the building had been recently erected; but all agreed, that if a stranger had owned the adjoining lands, he might obstruct the lights of a newly erected building, but not of an ancient building so that he has gained a right in the lights by prescription.

In 1 Comyn's Digest, title, "Action on the Case for a Nuisance," A., the cases are cited in which actions on the case for a nuisance have been allowed. If a man erect a house or mill to the nuisance of another, every occupier afterwards is subject to an action for the nuisance.

In the case of Rosewell *v.* Pryor, 6 Modern, 116, the question was, whether in a declaration for stopping the plaintiff's lights, it was necessary to state the lights and the messuage as being *ancient*, and it was held not to be necessary. In that case, Holt, Chief Justice, says: "If a man have a vacant piece of ground, and build thereupon, and that house has very good lights, and he lets this house to another, and after he builds upon a contiguous piece of ground, or lets the ground contiguous to another, who builds thereupon to the nuisance of the lights of the first house, the lessee of the first house shall have an action upon the case against such builder, for the first house was granted to him with all the easements and the lights then belonging to it."

This general principle is also stated in 3 Bl. Com. 217, where it is declared to be essential to the maintenance of the action, that the windows be *ancient*. The English cases are uniform on this subject; and Chancellor Kent, in 3 Kent's Com. 445, declares in general terms, that "according to the English law, the owner of a house will be restrained by injunction, and he will be liable to an action on the case, if he makes any erections or improvements, so as to obstruct the ancient lights of an adjoining house."

In our own country, too, the same doctrines have been maintained; and I do not perceive that Chancellor Kent, in his Commentaries above referred to, denies anywhere that the same rules of law on this subject apply in this country, except in a note, where he declares that this common law prescription does not reasonably or equitably apply to buildings on narrow lots in the rapidly growing cities in this country, and upon the ground that such was not the presumed intention of the owners of such lots. From all he says, I infer that he recognizes the general principles before stated as in force in this country, but exempts the case of city lots, from the necessity and reason of the thing, as necessary for their advancement and continued improvement.

The case of Story *v.* Odin, in 12 Mass. 157, is a very clear and plain decision in our own Courts. The property was situated in the town of Boston. The building was purchased of the town in 1795, and stood adjoining other lands of the town, with lights looking out directly upon this vacant land. In 1812, the

town sold this vacant lot, and the purchaser built directly adjoining the plaintiff's building, and obstructed his lights. The Court decided, that as the purchaser of the first building bought without reserving to the grantors any right to build on the adjoining ground so as to interfere with his lights, they could not, nor could their grantees, build so as to interfere with this right.

As to the proper cases for the interference of this Court to prevent private nuisance, the true rule, as it appears to me, is laid down in the case of Van Bergen *v.* Van Bergen, in 3 John. Ch. Rep. 287. The Chancellor says: "The cases in which chancery has interfered by injunction to prevent or remove a private nuisance, are those in which the nuisance has been erected to the prejudice or annoyance of a right which the other party had *long previously enjoyed.* It must be a strong and mischievous case of pressing necessity, or the right must have been previously established at law, to entitle the party to call to his aid the jurisdiction of this Court."

From a careful examination of the cases, and the principles on which they are decided, I have come to the conclusion, that the same rules which have been established in the English Courts, and in other States of the Union, upon this subject, apply with the same force to us, and that there is nothing in our condition which can prevent their wholesome application; that, as a general rule, in a case of ancient lights, where they have existed for upwards of twenty years undisturbed, the owner of the adjoining lot has no right to obstruct those lights, and particularly so, if the adjoining lot was owned by the man who built the house at the time, and subsequently sold by him; and that, whether this Court will interfere by injunction, or leave the party to establish his right at law, must depend on the particular circumstances of each case.

It remains to be considered, what is the case of the present complainants, and whether the injunction should be continued or not.

The property is situated in Belvidere, in the county of Warren, in this State, and was owned in fee, and possessed (as well the lot on which the house is built, as the adjoining one on which the obstruction is about to be erected) as far back as the year 1797, by one Benjamin Sexton. The premises consisted of

two lots, numbered 9 and 10, and adjoined each other. Sexton owning both these lots, which were each fifty-two feet in front and rising one hundred feet deep, in the year 1801 or 1802 erected the house in question, on lot No. 10, for his own residence, and placed the same on the line between said lots Nos. 9 and 10, and built on the end towards lot No. 9 six windows, besides two in the cellar. These windows have continued, *unmolested*, to receive light and air from across this lot No. 9, until the recent attempt of the defendant to build his wall for a new house directly against the same. Benjamin Sexton died intestate, in the year 1806; and his heirs at law sold lot No. 10, with the aforesaid house, on the 14th of March, 1829, to one Smith, who afterwards sold the same to the complainants. The lot No. 9 was conveyed by two of the heirs of Benjamin Sexton to a third heir, on the 28th of April, 1828; and that heir again conveyed the same, on the 20th of January, 1831, to one Matthews; which lot has since been conveyed to, and is now the property of, the defendant. On lot No. 9 there was also a building, standing back from the street about forty feet, and the front about eighteen feet from the nearest corner of the dwelling-house on lot No. 10.

Under these circumstances the defendant has commenced building the foundation of a house or shop, directly adjoining the house on lot No. 10, and so as to shut up the windows of that house. He is enjoined by this Court from so doing, and the question is, whether that injunction should be dissolved.

I am very clear the injunction ought not to be dissolved, and that upon all the authorities cited. The case is a very strong one. The builder of this house owned *both* lots at the time of erecting the building. The lights are *ancient*, having continued unmolested for thirty-five years. Lot No. 10, on which the house stands, passed out of the hands of the heirs at law of the original owner *first;* and there is no pressing necessity for this interference with the established rights of the complainants.

I am, therefore, of opinion, that the injunction was rightly issued in this case, and ought not to be disturbed.

Motion denied.

The Contrary Opinion.

HUBBARD *v.* TOWNS.

Supreme Court of Vermont.

33 Vermont, 295.

PIERPOINT, J. This action is brought to recover the damage claimed to have been sustained by the plaintiff in consequence of the defendant's obstructing his lights. It appears from the case that the building, which has been owned and occupied by the plaintiff and his tenants for more than twenty-five years prior to the acts complained of, stands upon the line between his premises and the premises of the defendant, and that the defendant has owned and occupied his premises during the aforesaid period; that the windows in the plaintiff's building opened out toward the premises of the defendant, admitting light from that direction, and that they have so remained without obstruction and without question on the part of the defendant for the period of twenty-five years or more; that in 1859 the defendant erected a building on his own premises immediately adjoining that of the plaintiff, so as to exclude the light from two of the plaintiff's windows.

The only question involved in this case is, whether the plaintiff by such long and uninterrupted use of his windows, and the light passing through them, has thereby acquired the right so to continue his windows and thus to have the light pass through them, so that any act of the defendant which shall materially obstruct such light will make him a wrongdoer, and liable for any damage to the defendant that may ensue therefrom.

The rule seems now to be well settled in England, that such long and uninterrupted use of light gives the right to continue its use, and to insist upon its remaining unobstructed by the adjoining proprietor for all time. The Courts place this upon the same ground as rights of way, and other rights acquired in and over the premises of another by long and undisturbed use; presuming from the long exercise of the privilege by the one, and an acquiescence therein by the other, that the right had its origin in a grant.

While the general doctrine has been universally adopted in

this country, its application to cases of this kind has not been generally recognized, and in many of the States has been expressly denied.

Our statute of limitations cannot be brought in aid of the plaintiff's claim. The statute in terms only deprives the aggrieved party of the right of action after the limited period from the time the cause of action accrues, and although our Courts have held that the exercise of the right by one party, and an acquiescence therein by the other, for such period, vests in the party so exercising it an absolute right, still, in determining the question whether such right has in fact become an absolute one, the time that the one has so exercised it is to be computed from the period when a cause of action therefor first accrued to the other, which he has omitted to enforce; so that no right can be lost or acquired by virtue of the statute where there has been no act done by the one for which the law gives a remedy by action to the other; and it is conceded in this case that the defendant had no right of action against the plaintiff for any act of his in erecting his building and opening and continuing his windows on the side adjoining to and overlooking the defendant's premises.

This reason would seem to apply with equal force against the plaintiff's right to recover on the ground that a grant will be presumed from lapse of time to sustain his claim.

The principle upon which a grant is presumed is, that in no other way can the acts of the parties be rationally accounted for. Such presumption is required to account for the exercise of the right by the one, and the acquiescence therein by the other, for so long a period.

The right must be exercised adversely or under a claim of a right so to exercise it by the one, and it must be acquiesced in by the other.

This of itself presupposes that the exercise of the right by the one, without a grant, is a violation of some right of the other; otherwise it could not be adverse within the meaning of the rule; neither could the other acquiesce, for that presupposes a legal right to object and resist.

If, then, there is no violation of the rights of another, no presumption of a grant by such other arises; there is no occasion

for it. There is no right exercised or claimed by the one that belongs to the other, or which he could grant, if he should attempt it.

How, then, can this doctrine of presumption apply to a case like the present? The erection of the building by the plaintiff on the line between him and the defendant was no violation of any right of the defendant; he could not complain of or prevent it, and his assent or dissent could in no manner affect the transaction. The legal right to do the act was perfect in the plaintiff. His right to erect his building on the division line is not controverted; the wisdom of the act is more questionable. He might have made his walls solid, thus entirely excluding the light from that direction; he chose to leave apertures therein, thereby allowing the light to remain unaffected to that extent; but how can it be said that by excluding the greater part he acquires any better right to the remainder than he would have had to the whole if he had not excluded any? He has not done any act which has had any effect to control or influence the light, except to exclude it. He did not draw or cause the light to pass in upon his premises in any other than its natural manner; it remained upon and over the defendant's premises as it had always been. As there was no interference with the rights of the defendant, it is difficult to see upon what the presumption of a grant can be based. Lapse of time and the presumption arising therefrom are resorted to only to justify in one that which would otherwise be a usurpation of the rights of another.

If a man can acquire, by use, a right to an uninterrupted enjoyment of light under circumstances like the present, why not acquire a right to a like enjoyment of the prospect from the same windows, or to a free access of the air to the outside of his building to prevent decay, and many other rights of a similar and no more ethereal character?

The result of which would be, if allowed, an utter destruction of the value of the adjoining land for building purposes. Windows are often of more importance for the prospect they afford than for the light they admit. The light may be obtained from other directions, the prospect cannot. A pleasant prospect from the windows of a dwelling always contributes

more or less to the enjoyment of the occupants, and often enters largely into its pecuniary estimate. But to admit that a mere enjoyment of such prospect for fifteen years gives him the right to insist that it shall remain uninterrupted for all future time, would be to recognize a principle at variance with well-established rules, and one that could not be tolerated in this country.

No such right can be acquired by use, for the same reason that its exercise by one is no infringement of the rights of another, for which the law gives an action. Le Blanc, J., in Chandler *v.* Thompson, 3 Camp. 82, says: "That although an action for opening a window to disturb the plaintiff's privacy was to be read of in the books, he had never known such an action to be maintained, and that he had heard it laid down by Eyre, Ch. J., that such an action did not lie."

We think the English Courts, in applying the doctrine of the presumption of grants from long use and acquiescence to this class of cases, clearly departed from the ancient common law rule as laid down in Berry *v.* Pope, Cro. Eliz. 118, and the error, as it seems to us, consists in placing cases like the present upon the same footing and making them subject to the same rules that govern another class of cases, to which they really have no analogy. In Lewis *v.* Price, 2 Saund. 175*a*, Wilmot, J., said: "That where a house has been built forty years, and has had lights at the end of it, if the owner of the adjoining ground builds against them so as to obstruct them, an action lies; and this is founded on the same reason as where they have been immemorial, for this is long enough to induce a presumption that there was originally some agreement between the parties and . . . . that twenty years was sufficient to give a man a title in ejectment on which he may recover the house itself, and he saw no reason why it should not be sufficient to entitle him to an easement belonging to the house." As we have already seen, no presumption of an agreement arises, as none was necessary to justify the act. The man who occupies his own house for twenty years has no better title to it at the end of that time than he had in the outset. Does he acquire any greater right to the light by the occupation than to the house?

Clearly not: having usurped no right, he can acquire none

by lapse of time. The error in the reasoning is in saying that because the man who takes possession of his neighbor's house and holds it adversely for twenty years (his neighbor acquiescing therein) acquires a title to it, therefore the man who opens windows in his own house that in no way interfere with the rights of his neighbor, and of which such neighbor has no legal right to complain, and keeps them open for twenty years, thereby acquires a right to insist that no act shall be done by his neighbor on his own land that in any respect interferes with or obstructs the light to those windows. In the one case there is an infringement of the rights of another for which the law gives a remedy by action; in the other there is not. This constitutes a radical difference between the two cases, and that, too, in respect to the very point upon which the whole doctrine of presumption in cases like those under consideration depends.

It might be urged with much force that a man who conveys a house with the privileges, etc., would not have a right to make an erection on his own land adjoining that would shut out the light from the windows in the house so conveyed, and it may be said that he who has occupied another's house for such a length of time and under such circumstances that a grant will be presumed, stands upon the same footing as an ordinary grantee. However that may be, this case involves no such question. In those cases the question turns upon the fact that the title to the premises was derived by deed, actual or presumed, from the party who seeks to deprive his grantee of the enjoyment of the right he has conveyed. The right does not depend upon the lapse of time, but is as perfect in the grantee the moment the deed is executed as it can ever be. Here the title to the premises of the plaintiff was never in the defendant, but has been in the plaintiff through the whole period.

This question was fully considered in New York, in the case of Parker *v.* Foote, 19 Wendell, 309. Bronson, J., says: "Upon what principle Courts in England have applied the same rule of presumption to two classes of cases so essentially different in character I have been unable to discover. If one commit a daily trespass upon the land of another, under a claim of right to pass over, or feed his cattle upon it, or divert the water from his mill, or throw it back upon his land or machinery, in these

and the like cases long-continued acquiescence affords strong presumption of right. But in the case of lights there is no adverse user, nor, indeed, any use whatever of another's property, and no foundation is laid for indulging any presumption against the rightful owner." And again he says: "There is no principle, I think, upon which the modern English doctrine of ancient lights can be supported."

The same doctrine was held in Pierre *v.* Fernald, 26 Maine, 436, and in Napier *v.* Bulwinkle, 5 Richardson (S. C.), 312, in both of which cases the subject was fully discussed.

We see no reason growing out of the nature or necessities of this class of cases that require us to extend the doctrine of the presumption of grants to them; but, on the other hand, the establishment of a rule that would require a man to erect a building or wall that he did not need on his own premises, for the sole purpose of excluding the light from his neighbor's windows, would lead to continual strife and bitterness of feeling between neighbors and result in great mischief.

The judgment of the County Court is affirmed.

2 Blackstone's Comm. 395, 402; Guest *v.* Reynolds, 68 Ill. 474; Morrison *v.* Marquardt, 24 Ia. 25; Pierce *v.* Farnald, 26 Me. 476; Mullen *v.* Stricker, 19 Oh. St.135; Jenks *v.* McWilliams, 115 Mass. 217; Rogers *v.* Sawin, 10 Gray, 376; Haverstick *v.* Sipe, 33 Pa. St. 368; Parkin *v.* Foote, 19 Wend. 309; Myers *v.* Gemmel, 10 Barb. 537.

II.

THE AIR.

Bishop *v.* Banks.

Supreme Judicial Court of Connecticut.

33 Conn. 118.

Park, J. The respondent has successfully answered all the claims of the petitioner for a continuance of the injunction, with but one exception, and that is, in relation to the bleating of calves kept upon the premises for slaughter. We think the facts found by the Court below upon this subject are sufficient

to require the interposition of the Court to prevent its continuance. It is found that the annoyance to the petitioner, proceeding from this cause, was so great at times as to drive him and his family from the occupancy of that part of his house nearest to the premises of the respondent. The Court presents an extreme case of the kind—one that will constitute a nuisance, if a nuisance can be produced from such cause. In the cases of Whitney *v.* Bartholomew, 21 Conn. 213, and of Brown & Brothers *v.* Illius, 27 Id. 84, this Court distinctly recognize the doctrine that a nuisance may be produced by offensive sounds in the prosecution of business lawful *per se*. The same doctrine is held in the case of Soltau *v.* DeHeld, 9 Eng. L. & Eq. R. 104, where an injunction was granted to restrain the ringing of church bells by a Roman Catholic community, although they were rung only upon the Sabbath. They were located so near a person's residence that his peace and quiet were greatly disturbed. If sounds of such character and so made can be sufficient to constitute a nuisance, how can it be questioned in the case under consideration?

It is difficult to conceive of any noise more destructive to the comfort and happiness of a family than the constant wailing of animals in distress in the immediate vicinity of their residence. Enjoyment under such circumstances would require nerves of brass and a heart of steel. But it is unnecessary to pursue this subject, for reason and law harmonize in declaring that the conduct of the respondent in this particular is unlawful and wrong. He should remember the maxim *sic utere tuo ut alienum non lædas*, and conduct accordingly.

The remaining claims urged by the petitioner for a continuance of the injunction are not supported by the allegations of his bill, and we do not therefore consider them.

We advise the Superior Court to so modify the injunction that the respondent may be allowed to prosecute his business, but to prevent the bleating of calves and the raising of offensive smells to the annoyance of the petitioner.

In this opinion the other Judges concurred.

3 Kent, § 448, and note;
I. C. R. R. Co. *v.* Grabel, 50 Ill. 421;
Fish *v.* Dodge, 4 Denio, 311;
Rich *v.* Basterfield, 4 Com. Bench, 783;
Brady *et al. v.* Weeks *et al.*, 3 Barb. 157;
Wood on Nuisances, § 76.

III.

WATER.

Dumont *v.* Kellogg.

Supreme Court of Michigan.

29 Mich. 420.

Cooley, J. The grievance complained of by Kellogg in the Court below was that Dumont had constructed a dam across a natural water-course, and by means thereof wrongfully detained the water in the stream to the prejudice and injury of the plaintiff, who was proprietor of a mill previously erected on the stream below. The reservoir created by defendant's dam was quite a large one, and plaintiff gave evidence that the flow of water in the stream below was considerably diminished by the increased evaporation and percolation resulting from the construction of this dam. The plaintiff had judgment in the Court below, and the case comes here upon exceptions, the errors principally relied upon being assigned upon the instructions to the jury, and involving the relative rights of riparian proprietors to make use of the waters of a running stream which is common to both, and to delay its flow for that purpose.

The instructions given were numerous, and the most of them were unexceptionable. Others appear to be based upon a view of the law which is not to be reconciled with the authorities. Of these are the following:—

"Every proprietor of lands on the banks of a stream and every mill-owner has an equal right to the flow of water in the stream as it was wont to run, without diminution or alteration; no proprietor has the right to use the water to the prejudice of the proprietors below him without the consent of the proprietors below; he cannot divert or diminish the quantity which would otherwise descend to the proprietors below.

"He must so use the water as not materially to affect the application of the water below or materially diminish its quantity.

"If the jury find from the evidence that Dumont's dam and pond have diminished, by the increased evaporation and soak-

age occasioned by it, the flow of the water in the Dumont Creek one-third, or any other material amount, and that the plaintiff has sustained damages thereby, then the plaintiff is entitled to recover in this action.

"The rights of a riparian proprietor are not to be measured by the reasonable demands of his business. His right extends to the use of only so much of the stream as will not materially diminish its quantity, so that in this case the question whether defendant needs the water as he uses it in his business is entirely immaterial.

"The defendant had the right to build a dam upon his land, but he must so construct the dam and so use the water as not to injure the plaintiff below in the enjoyment of the same water, according to its natural course."

In endeavoring to determine the soundness of these instructions, we may dismiss from the mind the fact that the plaintiff had first put the waters of the stream to practical use, since that fact gave him no superiority in right over the defendant. The settled doctrine now is that priority of appropriation gives to one proprietor no superior right to that of the others, unless it has been continued for a period of time, and under such circumstances as would be requisite to establish rights by prescription: Platt *v.* Johnson, 15 Johns. 213; Tyler *v.* Wilkinson, 4 Mason, 397; Gilman *v.* Tilton, 5 N. H. 231; Pugh *v.* Wheeler, 2 Dev. & Bat. 50; Hartsall *v.* Sill, 12 Penn. St. 248; Gould *v.* Boston Duck Co., 13 Gray, 442; Wood *v.* Edes, 2 Allen, 578; Parker *v.* Hotchkiss, 25 Conn. 321; Heath *v.* Williams, 25 Me. 209; Snow *v.* Parsons, 28 Vt. 463; Bliss *v.* Kennedy, 43 Ill. 67; Cowles *v.* Kidder, 24 N. H. 378. It is not claimed that any question of prescription is involved, and the case is consequently to be regarded as only presenting for adjudication the relative rights of the parties at the common law to make use of the flowing waters of the stream, unaffected by any exceptional circumstances.

And in considering the case, it may be remarked at the outset that it differs essentially from a case in which a stream has been diverted from its natural course and turned away from a proprietor below. No person has a right to cause such a diversion, and it is wholly a wrongful act, for which an action will

lie without proof of special damage. It differs, also, from the case of an interference by a stranger, who, by any means, or for any cause, diminishes the flow of the water; for this also is wholly wrongful, and no question of the reasonableness of his action in causing the diminution can possibly arise. And had the instructions which are excepted to been given with reference to a case of diversion, or of obstruction by a stranger, the broad terms in which the responsibility of the defendant was laid down to the jury might have found abundant justification in the authorities.

But as between two proprietors, neither of whom has acquired superior rights to the other, it cannot be said that one "has no right to use the water to the prejudice of the proprietor below him," or that he cannot lawfully "diminish the quantity which would descend to the proprietor below," or that "he must so use the water as not materially to affect the application of the water below, or materially to diminish its quantity." Such a rule would be in effect this: That the lower proprietor must be allowed the enjoyment of his full common-law rights as such, not diminished, restrained, or in any manner limited or qualified by the rights of the upper proprietor, and must receive the water in its natural state as if no proprietorship above him existed. Such a rule could not be the law so long as equality of right between the several proprietors was recognized, for it is manifest it would give to the lower proprietor superior advantages over the upper, and in many cases give him in effect a monopoly of the stream.

Cases may unquestionably be found in which the rule of law is laid down as broadly as it was given by the circuit Judge in this case; but an examination of them will show either that the facts were essentially different, or that the general language was qualified by the context. Thus the language employed in the first instruction as above given seems to have been quoted from Lord Tenterden in Mason *v.* Hill, 3 B. & Adol. 312. But there it had reference to a case of diversion of water, and was strictly accurate and appropriate. The same language substantially is made use of in Twiss *v.* Baldwin, 9 Conn. 291; Wadsworth *v.* Tillotson, 15 Conn. 373; Arnold *v.* Foot, 12 Wend. 331; and probably in many other cases, and is adopted

by Chancellor Kent in his Commentaries (vol. 3, p. 439). See also Bealey *v.* Shaw, 6 East, 208; Agawam Canal Co. *v.* Edwards, 36 Conn. 497; Williams *v.* Morland, 2 B. & C. 913; Mason *v.* Hill, 5 B. & Adol. 1; Tillotson *v.* Smith, 32 N. H. 95. But as between different proprietors on the same stream, the right of each qualifies that of the other, and the question always is, not merely whether the lower proprietor suffers damage by the use of the water above him, nor whether the quantity flowing on is diminished by the use, but whether under all the circumstances of the case the use of the water by one is reasonable and consistent with a correspondent enjoyment of right by the other. "Each proprietor is entitled to such use of the stream so far as it is reasonable, conformable to the usages and wants of the community, and having regard to the progress of improvement in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land on the same stream above and below:" Shaw, Ch. J., in Cary *v.* Daniels, 8 Metc. 477. "The common use of the water of a stream by persons having mills above, is frequently, if not generally, attended with damage and loss to the mills below; but that is incident to that common use, and for the most part unavoidable. If the injury is trivial, the law will not afford redress, because every person who builds a mill does it subject to this contingency. The person owning an upper mill on the same stream has a lawful right to use the water, and may apply it in order to work his mills to the best advantage, subject, however, to this limitation: That if in the exercise of this right, and in consequence of it, the mills lower down the stream are rendered useless and unproductive, the law in that case will interpose and limit this common right so that the owners of the lower mills shall enjoy a fair participation:" Woodworth, J., in Merritt *v.* Brinkerhoff, 17 Johns. 321. It is a fair participation and a reasonable use by each that the law seeks to protect. Such interruption in the flow "as is necessary and unavoidable by the reasonable and proper use of the mill privilege above" cannot be the subject of an action: Chandler *v.* Howland, 7 Gray, 350; and see Embrey *v.* Owen, 6 Exch. 353; Hetrich *v.* Deachler, 6 Penn. St. 32; Hartzall *v.* Sill, 12 Penn. St. 248; Pitts *v.* Lancaster Mills, 13

Met. 156; Bliss *v.* Kennedy, 42 Ill. 68. As was said by Mr. Justice Story in Tyler *v.* Wilkinson, 4 Mason, 401, to hold that there can be no diminution whatever, and no obstruction or impediment whatsoever, by a riparian proprietor in the use of water as it flows, would be to deny any valuable use of it. There may be and there must be allowed of that which is common to all a reasonable use by each. And if further authorities are important, Palmer *v.* Mulligan, 3 Caines, 308; Dilling *v.* Murray, 6 Ind. 324; Snow *v.* Parsons, 28 Vt. 459; Hayes *v.* Waldron, 44 N. H. 580; Davis *v.* Getchell, 50 Me. 602; and Clinton *v.* Myers, 46 N. Y. 514, may be referred to. It is, therefore, not a diminution in the quantity of the water alone, or an alteration in its flow, or either or both of these circumstances combined with injury, that will give a right of action, if in view of all the circumstances, and having regard to equality of right in others, that which has been done and which causes the injury is not unreasonable. In other words, the injury that is incidental to a reasonable enjoyment of the common right can demand no redress.

We think the Court erred also in declining to instruct the jury on defendant's request that in determining the question of reasonable use by the defendant they might consider, among other things, the general usage of the country in similar cases. As was said in Gould *v.* Boston Duck Co., 13 Gray, 452: "Usage is some proof of what is considered a reasonable and proper use of that which is a common right, because it affords evidence of the tacit consent of all parties interested to the general convenience of such use." And see Thurber *v.* Martin, 2 Gray, 394; Snow *v.* Parsons, 28 Vt. 459. Indeed in most cases this proof is the most satisfactory and conclusive that could be adduced, being established by the parties concerned, who understand better than any others what is reasonable and convenient, and who would not be likely to acquiesce in anything which was not so.

These errors render it necessary to order a new trial. Some of the rulings on the admission of evidence seem to have been very liberal, but we are not satisfied that they exceeded the bounds of judicial discretion.

The judgment will be reversed, with costs, and a new trial ordered.

The other Judges concurred.

Heath *v.* Williams, 25 Me. 209;
Parker *et al. v.* Hotchkiss, 25 Conn. 321;
Snow *v.* Parsons, 28 Vt. 459;
City of Emporia *v.* Soden, 25 Kas. 588;
Garwood *v.* N. Y. C. & H. R. R. R. Co., 83 N. Y. 400;
Swindon Water Wrks. Co. *v.* Wilts & Berks Canal Nav. Co., L. R. 7 H. L. 697.

ANIMALS FERÆ NATURÆ.

PER INDUSTRIAM.

"A qualified property may subsist in animals *ferœ naturœ* . . . . by a man's reclaiming them and making them tame by art, industry, and education, or by so confining them, within his own immediate power, that they cannot escape and use their natural liberty." 2 Blackstone's Comm. 391.

1.

Acts necessary to subject wild animals to the control of man so he will possess in them a special property.

PIERSON *v.* POST.

Supreme Court of New York.

3 Caines, 175.

TOMPKINS, J. This cause comes before us on a return to a certiorari directed to one of the justices of Queens County.

The question submitted by the counsel in this cause for our determination is, whether Lodowick Post, by the pursuit with his hounds in the manner alleged in his declaration, acquired such a right to, or property in, the fox, as will sustain an action against Pierson for killing and taking him away?

The cause was argued with much ability by the counsel on both sides, and presents for our decision a novel and nice question. It is admitted that a fox is an animal *ferœ naturœ*, and that property in such animals is acquired by occupancy only. These admissions narrow the discussion to the simple question

of what acts amount to occupancy, applied to acquiring right to wild animals?

If we have recourse to the ancient writers upon general principles of law, the judgment below is obviously erroneous. Justinian's Institutes, lib. 2, tit. 1, s. 13, and Fleta, lib. 3, c. 2, p. 175, adopt the principle that pursuit alone vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken. The same principle is recognized by Bracton, lib. 2, c. 1, p. 8.

Puffendorf, lib. 4, c. 6, s. 2 and 10, defines occupancy of beasts *ferœ naturæ*, to be the actual corporal possession of them, and Bynkershoek is cited as coinciding in this definition. It is indeed with hesitation that Puffendorf affirms that a wild beast mortally wounded, or greatly maimed, cannot be fairly intercepted by another whilst the pursuit of the person inflicting the wound continues. The foregoing authorities are decisive to show that mere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him.

It therefore only remains to inquire whether there are any contrary principles, or authorities, to be found in other books, which ought to induce a different decision. Most of the cases which have occurred in England, relating to property in wild animals, have either been discussed and decided upon the principles of their positive statute regulations, or have arisen between the huntsman and the owner of the land upon which beasts *ferœ naturæ* have been apprehended; the former claiming them by title of occupancy, and the latter *ratione soli*. Little satisfactory aid can, therefore, be derived from the English reporters.

Barbeyrac, in his notes on Puffendorf, does not accede to the definition of occupancy by the latter, but, on the contrary, affirms that actual bodily seizure is not, in all cases, necessary to constitute possession of wild animals. He does not, however, describe the acts which, according to his ideas, will amount to an appropriation of such animals to private use, so as to exclude the claims of all other persons, by title of occupancy, to the same animals; and he is far from averring that pursuit alone

is sufficient for that purpose. To a certain extent, and as far as Barbeyrac appears to me to go, his objections to Puffendorf's definition of occupancy are reasonable and correct. That is to say, that actual bodily seizure is not indispensable to acquire right to, or possession of, wild beasts; but that, on the contrary, the mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since, thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So also, encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labor, have used such means of apprehending them. Barbeyrac seems to have adopted, and had in view in his notes, the more accurate opinion of Grotius, with respect to occupancy. That celebrated author, lib. 2, c. 8, s. 3, p. 309, speaking of occupancy, proceeds thus: "*Requiritur autem corporalis quædam possessio ad dominium adipiscendum; atque ideo, vulnerasse non sufficit.*" But in the following section he explains and qualifies this definition of occupancy: "*Sed possessio illa potest non solis manibus, sed instrumentis, ut decipulis, retibus, laqueis dum duo adsint: primum ut ipsa instrumenta sint in nostra potestate, deinde ut fera, ita inclusa sit, ut exire inde nequeat.*" This qualification embraces the full extent of Barbeyrac's objection to Puffendorf's definition, and allows as great a latitude to acquiring property by occupancy as can reasonably be inferred from the words or ideas expressed by Barbeyrac in his notes. The case now under consideration is one of mere pursuit, and presents no circumstances or acts which can bring it within the definition of occupancy by Puffendorf, or Grotius, or the ideas of Barbeyrac upon that subject.

The case cited from 11 Mod. 74–130, I think clearly distinguishable from the present; inasmuch as there the action was for maliciously hindering and disturbing the plaintiff in the exercise and enjoyment of a private franchise; and in the report of the same case, 3 Salk. 9, Holt, Ch. J., states that the ducks

were in the plaintiff's decoy pond, and so in his possession, from which it is obvious the Court laid much stress in their opinion upon the plaintiff's possession of the ducks *ratione soli.*

We are the more readily inclined to confine possession or occupancy of beasts *feræ naturæ*, within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting, or pursuing such animals, without having so wounded, circumvented, or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.

However uncourteous or unkind the conduct of Pierson towards Post, in this instance, may have been, yet this act was productive of no injury or damage for which a legal remedy can be applied. We are of the opinion the judgment below was erroneous, and ought to be reversed.

Judgment of reversal.

DARLINGTON, P. P. 30;
2 Kent, 349;
1 Sch. P. P. 149;
11 Green. Evi. 620;
Bester *v.* Newkirk, 20 John. 75;
Brinckerhoff *v.* Starkins, 11 Barb. 248;
Decker *v.* Fisher, 4 Barb. 592;
Gillett *v.* Mason, 7 John. 16;
Ferguson *v.* Miller, 1 Cow. 243;
Armory *v.* Flynn, 10 John. 102;
Faber *v.* Gennie, 1 Sprague, 315;
Fennings *v.* Granville, 1 Taunt. 241;
Young *v.* Hickins, 1 Dav. & Mer. 592;
Hogarth *v.* Jackson, 1 Moody & Malkins, 58.

2.

Animals *ferœ naturœ* must be *kept*, as well as *captured*, in order to retain property in them.

Goff *v.* Kilts.

Supreme Court of New York.

15 Wend. 550.

Where the owner of a swarm of wild bees, which he has reclaimed, pursues them in their flight away from his hive and keeps them in sight till they light upon a tree on the land of another, and then marks the tree: *held*, that he kept them sufficiently within his control to preserve his qualified property in them.

Nelson, J. Animals *ferœ naturœ*, when reclaimed by the art and power of man, are the subject of a qualified property; if they return to their natural liberty and wildness without the *animus revertendi*, it ceases. During the existence of the qualified property it is under the protection of the law the same as any other property, and every invasion of it is redressed in the same manner. Bees are *ferœ naturœ*, but when hived and reclaimed a person may have a qualified property in them by the law of nature, as well as the civil law. Occupation, that is, hiving or enclosing them, gives property in them. They are now a common species of property and an article of trade, and the wildness of their nature by experience and practice has become essentially subjected to the art and power of man. An unreclaimed swarm, like all other wild animals, belongs to the first occupant—in other words, to the person who first hives them; but if a swarm fly from the hive of another, his qualified property continues so long as he can keep them in sight and possesses the power to pursue them. Under these circumstances no one else is entitled to take them: 2 Black. Comm. 393; 2 Kent's Comm. 394.

The question here is not between the owner of the soil upon which the tree stood that included the swarm and the owner

of the bees; as to him, the owner of the bees would not be able to regain his property or the fruits of it without being guilty of trespass. But it by no means follows from this predicament that the right to the enjoyment of the property is lost; that the bees therefore become again *ferœ naturœ*, and belong to the first occupant. If a domestic or tame animal of one person should stray to the enclosure of another, the owner could not follow and retake it without being liable for a trespass. The absolute right of property, notwithstanding, would still continue in him. Of this there can be no doubt. So in respect to the qualified property in the bees. If it continued in the owner after they hived themselves and abode in the hollow tree, as this qualified interest is under the same protection of law as if absolute, the like remedy existed in case of an invasion of it. It cannot, I think, be doubted that if the property in the swarm continues while within sight of the owner—in other words, while he can distinguish and identify it in the air—that it equally belongs to him if it settles upon a branch or in the trunk of a tree, and remains there under his observation and charge. If a stranger has no right to take the swarm in the former case, and of which there seems no question, he ought not to be permitted to take it in the latter, when it is more confined and within the control of the occupant. It is said the owner of the soil is entitled to the tree and all within it. This may be true, so far as respects an unreclaimed swarm. While it remains there in that condition, it may, like birds or other game (game laws out of the question), belong to the owner or occupant of the forest, *ratione soli*, according to the law of nature, where prior occupancy alone gave right, the individual who first hived the swarm would be entitled to the property in it; but since the institution of civil society and the regulation of the right of property by its positive laws, the forest as well as the cultivated field belongs exclusively to the owner, who has acquired a title to it under those laws. The natural right to the enjoyment of the sport of hunting and fowling wherever animals *ferœ naturœ* could be found, has given way, in the progress of society, to the establishment of rights of property better defined and of a more durable character. Hence no one has a right to invade the enclosure of

another for this purpose. He would be a trespasser, and as such liable for the game taken. An exception may exist in the case of noxious animals, destructive in their nature. Mr. Justice Blackstone says: If a man starts game in another's private grounds and kills it there, the property belongs to him in whose ground it is killed, because it was started there, the property arising *ratione soli:* 2 Black. Comm. 419. But if animals *feræ naturæ* that have been reclaimed, and a qualified property obtained in them, escape into the private grounds of another in a way that does not restore them to their natural condition, a different rule obviously applies. They are then not exposed to become the property of the first occupant. The right of the owner continues, and though he cannot pursue and take them without being liable for a trespass, still this difficulty should not operate as an abandonment of the animals to their former liberty. The rights of both parties should be regarded and reconciled as far as is consistent with a reasonable protection of each. The cases of Heermance *v.* Vernay, 6 Johns. R. 5, and Blake *v.* Jerome, 14 Id. 406, are authorities for saying, if any were wanted, that the inability of the owner of a personal chattel to retake it while on the premises of another without committing a trespass, does not impair his legal interest in the property. It only embarrasses the use or enjoyment of it. The owner of the soil, therefore, acquiring no right to the property in the bees, the defendant below cannot protect himself by showing it out of the plaintiff in that way. It still continues in him, and draws after it the possession sufficient to maintain this action against a third person, who invades it by virtue of no other claim than that derived from the law of nature. This case is distinguishable from the cases of Gillet *v.* Mason, 7 Johns. R. 16, and Ferguson *v.* Miller, 1 Cowen, 243. The first presented a question between the finder and a person interested in the soil; the other between two persons, each claiming as the first finder. The plaintiff in the last case, though the first finder, had not acquired a qualified property in the swarm according to the law of prior occupancy. The defendant had. Besides, the swarm being unreclaimed from their natural liberty while in the tree, belonged to the

owner of the soil *ratione soli*. For these reasons I am of opinion that the judgment of the court below should be affirmed.

Judgment affirmed.

DARLINGTON, P. P. p. 30; 2 Blackstone, 293; 2 Kent's Com. 394; 1 Schouler, P. P. § 48.

3.

But one may retain his property in animals *feræ naturæ*, though they wander from his immediate control, if they have the habit of returning to him *animus revertendi*.

MANNING *v.* MITCHERSON.

Supreme Court of Georgia.

69 Georgia, 447.

CRAWFORD, J. The questions submitted for our adjudication by this record, and insisted on by counsel for the plaintiff in error, are substantially:—

(1) Whether such a property right can exist in a canary bird as to make it the subject-matter of a possessory warrant.

(2) Whether, even if this be so, such warrant will lie against the husband to recover property in the possession, custody, or control of the wife.

(3) Whether the notary public, and *ex-officio* justice of the peace, did not commit error in his decision in this case, in giving judgment in favor of the plaintiff in the warrant, against the weight of evidence submitted on the trial.

1. The law of Georgia is, that to have property in animals, birds, and fishes which are wild by nature, one must have them within his actual possession, custody, or control, and this he may do by taming, domesticating, or confining them.

The answer of the *ex-officio* justice of the peace in this case, the same being a certiorari and no traverse thereof, must be

taken as true, and it says, that according to the testimony of all the witnesses the bird in controversy was shown to have been tamed. It was also testified that it had been in the possession of the plaintiff in the warrant about two years; that it knew its name, and when called by its owner would answer the call; that it had left its cage on one occasion, and, after having been gone a day or two, returned; that on the 27th day of December, before the preceding new year's day, it was missing from its cage, and on the latter day it was received and taken possession of by the defendant, who had kept it in confinement ever since.

Under this evidence, there does not seem to be any question of sufficient possession and dominion over this bird to create a property right in the plaintiff. To say that if one has a canary bird, mocking-bird, parrot, or any other bird so kept, and it should accidentally escape from its cage to the street, or to a neighboring house, that the first person who caught it would be its owner, is wholly at variance with our views of right and justice. To hold that the travelling organist with his attendant monkey, if it should slip its collar, and go at will out of his immediate possession and control, and be captured by another person, that he would be the true owner and the organist lose all claim to it, is hardly to be expected; or that the wild animals of a menagerie, should they escape from their owner's immediate possession, would belong to the first person who should subject them to his dominion.

2. Upon the second question presented for our consideration, we hold that a possessory warrant will lie against any one who receives or takes possession of a personal chattel under a pretended claim, and without lawful warrant or authority. To apply this principle to the facts of this case, as they are set out in the answer of the justice, we must say that, though the wife may possibly have had the personal care of the bird in question, yet it is clear that it was in the power, custody, and control of the husband, and was undoubtedly surrendered to the officer by his authority and direction. So that, really, no question can be legally made on the point here raised, as the possession of the wife was but the possession of the husband.

3. That the justice gave judgment in favor of the plaintiff in the warrant against the weight of evidence, we do not admit. The testimony for the plaintiff was positive and convincing, and the testimony of Robt. Gignilliat, Esq., given in his place as an attorney, without being sworn, shows that the refusal to return the bird, as stated to him by the defendant himself, was owing more to the offensive manner in which it was demanded, than to any claim of right which he set up by ownership or possession. This statement was not denied or controverted by the defendant, though he was a witness in the case. The weight of the testimony appears to be clearly with the plaintiff. Under the law and the testimony there was no error in dismissing the certiorari.

Judgment affirmed.

See 2 Blackstone, 392;
2 Kent, 248;
1 Schouler, P. P., p. 49;
Armory *v.* Flynn, 10 John. 105;
Canary bird: Manning *v.* Mitcherson, 47 Amer. Repts. 464;
Buffalo: Ulery *v.* Jones, 81 Ill. 403; 20 Mo. 457;
Oyster cases: Decker *v.* Fisher, 4 Barb. 592;
Brinckerhoff *v.* Starkins, 11 Barb. 248;
Lowndes *v.* Dickerson, 34 Barb. 586;
State *v.* Taylor, 27 N. J. L. 117.

4.

A person may acquire a qualified property in animals *feræ naturæ* by reason of their being upon his land—*ratione soli.*

Gillett *v.* Mason.

Supreme Court of New York.

7 Johnson, 16.

Where one finds a swarm of bees on the land of another, and marks the tree where they are with the initials of his name: *held*, that he cannot hold them as against the owner of the land where the tree stands.

Per Curiam. Bees are considered by Judge Blackstone (2 Comm. 392) as *feræ naturæ*, but when hived and reclaimed a

qualified property may be acquired in them. Occupation of them, according to Bracton, that is, hiving or enclosing them, gives the property in bees. In the present case, it appears the bees were not hived before they were discovered by the defendant in error, and the only act he did was to mark the tree. The land was not his, nor was it in his possession. Marking the tree did not reclaim the bees, nor vest an exclusive right of property in the finder, especially in this case, against the plaintiff in error, who, as one of the children of Timothy Gillet (who does not appear to have made a will), must be considered as one of the heirs, and, as such, a tenant in common in the land. Blackstone (vol. 2, p. 393) inclines to the opinion that under the Charter of the Forest, allowing every freeman to be entitled to the honey found within his woods, a qualified property may be had in bees, in consideration of the soil whereon they are found, or an ownership, *ratione soli*. According to the civil law (Just. Inst. lib. 2, tit. 1, s. 14), bees which swarm upon a tree are not private property until actually hived; and he who first encloses them in a hive becomes their proprietor.

Judgment reversed.

DARLINGTON, P. P. 31;
2 Blackstone, 393;
1 Sch. P. P., § 49, note;
Ferguson *v.* Miller, 1 Cow. 243;
Adams *v.* Burton, 43 Vt. 36;
Idol *v.* Johns, 2 Dev. Law (N. C.) 162.

But see Wallis *v.* Mease, 3 Binn. (Pa.) 546.

A trespasser acquires no property in animals *feræ naturæ*, which he kills on the land of another.

Rigg *v.* Earle of Lonsdale, 1 Hurl. & N. 923;
Blade *v.* Higgs, 13 C. B., N. S. 844;
Blade *v.* Higgs, 11 H. L. C. 621.

5.

A person may have a qualified property in animals *feræ naturæ* in two other instances:—

1. *Ratione impotentiæ*, as where animals have their

young upon his land and they cannot escape by reason of their weakness.

2. Where one person has the exclusive privilege of hunting, fishing, and killing animals—*propter privilegium.*

The Case of the Swans.

Court of King's Bench.

4 Coke's Reports, 82.

This case covers a wide range of subjects within the topic under consideration, and the following is but a brief abstract thereof, bearing particularly upon animals *feræ naturæ:* 1st, *ratione impotentiæ;* and, 2d, *propter privilegium*

"There are three manners of rights of property: Property absolute, property qualified, and property possessory. A man hath not absolute property in anything which is *feræ naturæ*, but in those which are *domitæ naturæ.* Property qualified and possessory a man may have in those which are *feræ naturæ*, and to such property a man may attain by two ways: by industry, or *ratione impotentiæ et loci;* by industry as by taking them, or by making them *mansueta* . . . . but in those which are *feræ naturæ*, and by industry are made tame, a man hath but a qualified property in them, *scil.* so long as they remain tame, for if they do attain to their natural liberty, and have not *animum revertendi*, the property is lost: *ratione impotentiæ et loci*, as if a man has young shovelers or goshawks or the like, which are *feræ naturæ*, and they build in my land, I have possessory property in them, for if one takes them when they cannot fly, the owner of the soil shall have an action of trespass. . . . But when a man hath savage beasts, *ratione privilegii*, as by reason of a park, warren, etc., he hath not any property in the deer, or conies, or pheasants, or partridges . . . . he hath no property in them, but they do belong to him *ratione privilegii* for his game and pleasure, so long as they remain in the privileged place; for, if the owner of the park dies, his heirs shall have

them, and not his executors or administrators, because without them the park, which is an inheritance, is not complete."

DARLINGTON, P. P. 30; 2 Blk. 394; 2 Sch. P. P. 49; Wms. Ex., Pt. 2, Book 2, Ch. 2, § 1; Sutton *v.* Moody, 5 Mod. 376; Blade *v.* Higgs, 11 H. L. C. 621.

6.

The qualified property which one has in animals *ferœ naturœ* will be protected by the law, and civil actions will lie to enforce or maintain such property rights.

GHEN *v.* RICH.

U. S. D. C., Dist. of Mass., April, 1881.

8 Fed. Rep. 159.

Where a person who first captures an animal *ferœ naturœ* (a whale), and does all to appropriate him which the circumstances of the case will permit: *held*, that he thereby acquires property therein, and for the conversion of which an action at law will lie.

NELSON, D. J. This is a libel to recover the value of a fin-back whale. The libellant lives in Provincetown, and the respondent in Wellfleet. The facts, as they appeared at the hearing, are as follows:—

In the early spring months the easterly part of Massachusetts Bay is frequented by the species of whale known as the fin-back whale. Fishermen from Provincetown pursue them in open boats from the shore, and shoot them with bomb-lances fired from guns made expressly for the purpose. When killed they sink at once to the bottom, but in the course of from one to three days they rise and float on the surface. Some of them are picked up by vessels and towed into Provincetown. Some float ashore at high water and are left stranded on the beach as the tide recedes. Others float out to sea and are never recovered. The person who happens to find them on the beach usually sends word to Provincetown, and the owner comes to

the spot and removes the blubber. The finder usually receives a small salvage for his services. Try-works are established in Provincetown for trying out the oil. The business is of considerable extent, but, since it requires skill and experience, as well as some outlay of capital, and is attended with great exposure and hardship, few persons engage in it. The average yield of oil is about 20 barrels to a whale. It swims with great swiftness, and for that reason cannot be taken by the harpoon and line. Each boat's crew engaged in the business has its peculiar mark or device on its lances, and in this way it is known by whom a whale is killed.

The usage on Cape Cod, for many years, has been that the person who kills a whale in the manner and under the circumstances described, owns it, and this right has never been disputed until this case. The libellant has been engaged in this business for ten years past. On the morning of April 9, 1880, in Massachusetts Bay, near the end of Cape Cod, he shot and instantly killed with a bomb-lance the whale in question. It sunk immediately, and on the morning of the 12th was found stranded on the beach in Brewster, within the ebb and flow of the tide, by one Ellis, 17 miles from the spot where it was killed. Instead of sending word to Princeton, as is customary, Ellis advertised the whale for sale at auction, and sold it to the respondent, who shipped off the blubber and tried out the oil. The libellant heard of the finding of the whale on the morning of the 15th, and immediately sent one of his boat's crew to the place and claimed it. Neither the respondent nor Ellis knew the whale had been killed by libellant, but they knew or might have known, if they had wished, that it had been shot and killed with a bomb-lance, by some person engaged in this species of business.

The libellant claims title to the whale under this usage. The respondent insists that this usage is invalid. It was decided by Judge Sprague in Taber *v.* Jenny, 1 Sprague, 315, that when a whale has been killed, and is anchored and left with marks of appropriation, it is the property of the captors; and if it is afterwards found, still anchored, by another ship, there is no usage or principle of law by which the property of the original

captors is diverted, even though the whale may have dragged from its anchorage. The learned Judge says:—

"When the whale had been killed and taken possession of by the boat of the Hillman (the first taker), it became the property of the owners of that ship, and all was done which was then practicable in order to secure it. They left it anchored, with unequivocal marks of appropriation."

In Bartlett *v.* Budd, 1 Low. 223, the facts were these: The first officer of the libellant's ship killed a whale in the Okhotsk Sea, anchored it, attached a waif to the body, and then left it and went ashore at some distance for the night. The next morning the boats of the respondent's ship found the whale adrift, the anchor not holding, the cable coiled round the body, and no waif or irons attached to it. Judge Lowell held that, as the libellants had killed and taken actual possession of the whale, the ownership vested in them. In his opinion the learned Judge says:—

"A whale, being *ferœ naturœ*, does not become property until a firm possession has been established by the taker. But when such possession has become firm and complete, the right of property is clear, and has all the characteristics of property."

He doubted whether a usage set up, but not proved, by the respondents, that a whale found adrift in the ocean is the property of the finder, unless the first taker should appear and claim it before it is cut in, would be valid, and remarked that "there would be great difficulty in upholding a custom that should take the property of A. and give it to B., under so very short and uncertain a substitute for the statute of limitations, and one so open to fraud and deceit." Both the cases cited were decided without reference to usage, upon the ground that the property had been acquired by the first taker by actual possession and appropriation.

In Swift *v.* Gifford, 2 Low. 110, Judge Lowell decided that a custom among whalemen in the Arctic seas, that the iron holds the whale, was reasonable and valid. In that case a boat's crew from the respondent's ship pursued and struck a whale in the Arctic Ocean, and the harpoon and the line attached to it remained in the whale, but did not remain fast to the boat. A boat's crew from the libellant's ship continued the pursuit and

captured the whale, and the master of the respondent's ship claimed it on the spot. It was held by the learned Judge that the whale belonged to the respondents. It was said by Judge Sprague, in Bourne *v.* Ashley, an unprinted case, referred to by Judge Lowell in Swift *v.* Gifford, that the usage for the first iron, whether attached to the boat or not, to hold the whale was fully established; and he added that, although local usages of a particular port ought not to be allowed to set aside the general maritime law, this objection did not apply to a custom which embraced an entire business, and had been concurred in for a long time by every one engaged in the trade.

In Swift *v.* Gifford, Judge Lowell also said:—

"The rule of law invoked in this case is one of very limited application. The whale fishery is the only branch of industry of any importance in which it is likely to be much used, and it a usage is found to prevail generally in that business, it will not be open to the objection that it is likely to disturb the general understanding of mankind by the interposition of an arbitrary exception."

I see no reason why the usage proved in this case is not as reasonable as that sustained in the cases cited. Its application must necessarily be extremely limited, and can affect but a few persons. It has been recognized and acquiesced in for many years. It requires in the first taker the only act of appropriation that is possible in the nature of the case. Unless it is sustained, this branch of industry must necessarily cease, for no person would engage in it if the fruits of his labor could be appropriated by any chance finder. It gives reasonable salvage for securing or reporting the property. That the rule works well in practice is shown by the extent of the industry which has grown up under it, and the general acquiescence of a whole community interested to dispute it. It is by no means clear that without regard to usage the common law would not reach the same result. That seems to be the effect of the decisions in Taber *v.* Jenny, and Bartlett *v.* Budd. If the fisherman does all that it is possible to do to make the animal his own, that would seem to be sufficient. Such a rule might well be applied in the interest of trade, there being no usage or custom to the contrary: Holmes, Com. Law, 217. But, be that as it

may, I hold the usage to be valid, and that the property in the whale was in the libellant.

The rule of damages is the market value of the oil obtained from the whale less the cost of trying it out and preparing it for the market, with interest on the amount so ascertained from the date of conversion. As the question is new and important, and the suit is contested on both sides, more for the purpose of having it settled than for the amount involved, I shall give no costs.

Decree for libellant for $71.05, without costs.

Whale cases :—
Faber *v.* Gennie, 1 Sprague, 315 ; Fennings *v.* Granville, 1 Taunt. 241 ; Hogarth *v.* Jackson, 1 Moody & Malk. 58 ;
See oyster cases, *supra.*

7

Animals *ferœ naturœ* reclaimed, suitable for food, and within the custody of their owner, are the subjects of larceny.

COMMONWEALTH *v.* CHACE.

Supreme Court of Massachusetts, 1829.

9 Pickering, 15.

Doves are the subjects of larceny if taken when within the owner's custody, but otherwise if taken when without his custody.

PARKER, C. J. It is held in all the authorities, that doves are *ferœ naturœ*, and as such are not subjects of larceny, except when in the care and custody of the owner ; as when in a dovecot or pigeon-house, or when in the nest before they are able to fly. If, when thus under the care of the owner, they are taken furtively, it is larceny.

The reason of this principle is, that it is difficult to distinguish them from other fowl of the same species. They often take a flight and mix in large flocks with the doves of other persons, and are free tenants of the air, except when impelled

by hunger or habit, or the production or preservation of their young, they seek the shelter prepared for them by the owner. Perhaps, when feeding on the grounds of the proprietor, or resting on his barn or other buildings, if killed by a stranger, the owner may have trespass, and if the purpose be to consume them as food, and they are killed or caught or carried away from the enclosure of the owner, the act would be larceny. But in this case there is no evidence of the situation they were in when killed, whether on the flight, a mile from the grounds of the owner, or mingled with the doves of other persons, enjoying their natural liberty. Without such evidence the act of killing them, though for the purpose of using them as food, is not felonious. Therefore a new trial is granted.

DARLINGTON, P. P. p. 31;
2 Blk. 393;
4 Blk. 435;
1 Sch. P. P. § 50;
State *v.* Murphy, 8 Blackf. (Ind.) 498;
Reg. *v.* Cheafor, 15 Jur. 1065;
Rex *v.* Brooks, 4 C. & P. 131;
Reg. *v.* Shickle, L. R. 1 C. C. 158;
Reg. *v.* Learing, Russ. & Ry. 350;
Reg. *v.* Cary, 10 Cox C. C. 23;
Reg. *v.* Cox, 1 C. & K. 494;
Reg. *v.* Gallears, 2 Cox C. C., 572.

8.

Some American authorities question the English rule, holding that larceny may be committed of animals of a base nature if they have a financial value.

STATE *v.* HOUSE.

Supreme Court of North Carolina.

65 N. C. 315.

SETTLE, J. There was an error in quashing the indictment, on the ground that the thing stolen was not the subject of larceny.

An otter belongs to the class of animals known as *ferœ naturæ*, and therefore it was necessary to allege in the indict-

ment that it had been reclaimed or confined, or that it was dead. This is done in the indictment under consideration. It was not suggested that animals *feræ naturæ* are not the subject of larceny, provided they are fit for the food of man and are dead or confined, but we apprehend that his Honor acted upon another distinction laid down in the English authorities, to wit: That there is a class of animals which, though they may be reclaimed, are not such of which larceny can be committed, by reason of the baseness of their nature.

All of the distinctions as to animals *feræ naturæ* and as to their generous or base natures, which we find in the English books, will not hold good in this country. The English system of game laws seems to have been established more for princely diversion than for use or profit, and is not at all suited to the wants of our enterprising trappers.

We take the true criterion to be, the value of the animal, whether for the food of man, for its fur or otherwise. We know that the otter is an animal very valuable for its fur, and we know also that the fur trade is an important one in America, and even in some parts of North Carolina. If we are to be bound absolutely by the English authorities, without regard to their adaptation to this country, we should be obliged to hold that most of the animals so valuable for their fur are not the subject of larceny, on account of the baseness of their nature, while at the same time we should be bound to hold that hawks and falcons, when reclaimed, are the subject of larceny in respect of their generous nature and courage.

There was error. Let this be certified.

PER CURIAM.

Judgment reversed.

DARLINGTON, P. P., p. 31. 1 Schouler, P. P., sec. 50.

9.

But larceny cannot be committed of animals *ferœ naturæ* unless they are reclaimed and also suitable for food.

WARREN *v.* THE STATE.

Supreme Court of Iowa.

1 Green, 106.

A raccoon is an animal *ferœ naturæ*, and being of a base nature in contemplation of law is not the subject of larceny.

GREENE, J. The plaintiff in error was found guilty in the Court below on an indictment for larceny. A motion was made for a new trial, and overruled. We learn from the bill of exceptions that testimony was adduced on the trial proving that about eighteen or nineteen months after B. S. Wilcox missed a number of traps, a boat-hook, etc., Shook, the prosecuting witness, proceeded with the officer, and a search warrant, to the house of Warren, and after a slight search repaired to a flax stack, five or six rods from the house; when one Fulk said to the officer that "he was an old miner, and could strike a lode in three licks." Though the ground was covered with snow, Shook showed Fulk where to dig; and he commenced accordingly, and, with the third blow of the mattock, struck the lid of a box, identified as the property of Warren, which contained a portion of the stolen traps. They then went to the prisoner's blacksmith shop, and there found the boat-hook with the handle sawed off on the shop floor, where it had been lying about for several months. It also appears that Shook had been living with Warren, and that they had some difficulty a short time before the prosecution commenced. The Court instructed the jury, though requested to give the contrary charge, that the fact of finding the traps in the manner described was *prima facie* evidence that Warren had stolen them. To this instruc-

tion of the Court the plaintiff took exception, and now urges the objection under his first two errors assigned.

This charge to the jury was manifestly erroneous. The long space of time which elapsed from the missing to the discovery of the goods, the place, together with the peculiar circumstances under which they were found, concur in removing the presumption of guilt in the prisoner. Such a presumption is only created when the goods are found in the possession of a person within a short period after the larceny. The lapse of three months after the articles were stolen has been recognized as sufficient to rebut the presumption of guilt in a person in whose possession the goods were found; but it has been otherwise determined after the expiration of only two months, when connected with evidence of concealment and other suspicious circumstances: 1 Cowen and Hill's Notes, 425, 426, and the references.

After the lapse of sufficient time for the goods to change hands, and when they are of a portable nature, it would often be attended with serious oppression and injustice to require a person to account for the possession. Still more serious would be the consequences of taking a prisoner's guilt for granted after so remote a period, and under the circumstances which are presented in this case.

The place where the articles were found, the very suspicious deportment of one or two of those who participated in the finding, leave ample room to presume that others may have been more intimately connected with the larceny than the prisoner. In relation to the place, etc., of finding stolen goods, see Cowen and Hill's Notes, 426, 427.

By request of counsel, we will briefly notice the other errors assigned. The third avers that the Court erred in overruling the motion for a new trial. As the charge to the jury was so manifestly improper, the motion for a new trial should have been granted. The only other reason assigned for a new trial is that of newly-discovered evidence. This is a matter usually confined to the sound discretion of the district Judge; because the application is often attended with circumstances which are not made apparent to the appellate Court. The affidavit of the prisoner alone, setting forth the newly-discovered facts, and by

whom he can prove them, taken in connection with other concurring appearances, and the applicability of the newly-discovered evidence towards affecting a material change in the verdict, has been held sufficient to justify a new trial, without the affidavit of the witness by whom the facts are expected to be proven; but the requirement of such an affidavit we regard as the safest practice: Bight *v.* Wills, 7 B. Monroe, 122. Only in cases where the grounds for a new trial may be determined by the established principles of law, or upon facts appearing of record, it is clearly within the province of this Court to revise and correct the proceedings below: Cook *v.* U. S., *ante* 56; Brazelton *v.* Jenkins, Morris, 15.

It may be well to observe that even in cases where the question of a new trial is within the discretion of the district Court, the law contemplates a full hearing and fair trial to all; and if from any cause, a party having used due diligence, has not been able to present the substantial merits of his case to the jury, a rehearing should be allowed.

The verdict is objected to by the fourth assignment of error, because it is for the aggregate value of the articles stolen. In this we can see no error.

The fifth error assigned is that part of the property averred to have been stolen, a raccoon, is not the subject of larceny. The principle is well settled that taking from another's possession an aminal *feræ naturæ*, or of a base nature, in contemplation of law will not render a person liable for larceny, though the right of the owner would be protected by a civil action. As this principle applies by common law to monkeys, bears, foxes, etc., it will evidently apply to coons: 5 N. H. 204.

But, for this reason alone, the judgment of the district Court would not be disturbed when the indictment avers the stealing of other articles properly the subject of larceny; and when it appears by the transcript that the nature of the offence could not have been reduced, nor the fine materially lessened, by excluding the objectionable article.

The last error assigned is that the proper oath was not administered to the jury. The transcript of the record states that the jury were sworn the truth to speak on the issue joined,

etc. It is hardly necessary to state that such an oath is not recognized by the statute: See Rev. Stat. 298.

The judgment is reversed, and the cause remanded to the district Court of Clinton County for a new trial.

Judgment reversed.

See Norton *v.* Ladd, 5 N. H. 203. State *v.* Kidder, 78 N. C. 481.

10.

DOGS AND CATS.

THE DOG.

STATE *v.* MARRIAM.

Supreme Judicial Court of Maine, 1884.

75 Maine, 562.

DANFORTH, J.: Demurrer to an indictment found under R. S., c. 127, § 1, which provides for killing or wounding "domestic animals." The indictment alleges the killing a dog. Therefore the question involved is, not whether any particular dog or any number of dogs have become so domesticated as to be called domestic animals, but whether as a class they may properly be so called in distinction from that class known in law as *ferœ naturæ*. If the dog belongs to the latter class, the indictment must fail, for the statute does not cover that class. A distinction has been recognized in the law between the two classes from the origin of the common law, from the earliest date of authentic history, when the wealth of individuals was reckoned by the number of their flocks and herds.

That by the common law the dog belongs to the wild class of animals is recognized by all the authorities. And in that state he was and is utterly worthless, his flesh even being unfit for food, so that legally he was said to have no intrinsic value, and "though a man may have a bare property therein, and maintain a civil action for the loss of them, yet they are not of such estimation as that the stealing them amounts to larceny:" 4 Bl. Com. 236; 2 Bishop's Crim. Law, § 773. It is

true that dogs have extensively become domesticated, so that it is usual and perhaps not an improper use of language to call them "domestic animals," but as they still retain in a great measure their natural propensities, they may more properly be called domestic animals with vicious habits. They still keep their wild characteristics which ally them to the class of animals *ferœ naturæ;* so much so, that in their domestic state they furnish no support to the family, add nothing in a legal sense to the wealth of the community, are not inventoried as property of a debtor or dead man's estate, or as liable to taxation unless under a special provision of the statute; but when kept it is for pleasure, or, if any usefulness is obtained from them, it is founded upon this very ferocity natural to them by which they are made to serve as a watch or for hunting.

From his greater attachment to his master in the domestic state, from which arises a well-founded expectation of his return when lost, the law gives the owner the right of reclamation; but in all other respects the owner has only that qualified property in him which he may have in wild animals generally.

These continuing instincts, from which arises the danger that he may at any time relapse into his savage state, have made it necessary in all States to have a code of laws peculiarly applicable to the dog, and not applicable to domestic animals; not for the protection of his life, but rather for the protection of the community from his ferocity: Smith *v.* Forehand, 100 Mass. 140; 20 Albany Law Journal, 6. Under these laws the dog is recognized as property so far as to afford a civil remedy for an injury, but seldom if ever any other. In many cases it is made lawful for a man to kill the dog of another, as when he becomes a public nuisance: 1 Bishop Crim. Law, § 1080, and note; and in various other instances as provided in our own State: R. S. c. 30.

Thus it will be perceived that originally the dog belonged to the class of animals *ferœ naturæ*, and that up to the present time the law has treated him as continuing in that class, and has never recognized him as belonging to the domestic class. The two statutes, c. 30, R. S., and c. 127, the first relating to dogs and the latter to domestic animals, are so different that they cannot be reconciled. If a person is liable to be convicted

for killing a dog under c. 127, he may be punished for what he has a legal right to do under c. 30.

But, as dogs have never been recognized in the law as belonging to the class denominated "domestic animals," and as domestic animals alone are mentioned, it would be contrary to all rules of construction to extend the meaning of a statute so highly penal beyond its exact terms.

Exceptions and demurrer sustained.

Dissenting Opinion.

APPLETON, C. J.: This is an indictment against the defendant for malicious mischief, under the provisions of R. S. c. 127, § 1, which provides that "whoever wilfully or maliciously kills, wounds, maims, disfigures, or poisons any domestic animal . . shall be punished by imprisonment not more than four years, or by fine not exceeding five hundred dollars." It will be perceived that the largest discretion is allowed in regard to the punishment to be inflicted or the fine to be imposed.

The indictment alleges that the defendant on July 24, 1882, at Waldoboro', in the county of Lincoln, "with force and arms one Newfoundland dog, called 'Rich,' of the value of one hundred dollars of the goods and chattels of John D. Miller, then and there in the inclosure and immediate care of his master being, did then and there wilfully and maliciously kill and destroy, against the peace of said State and contrary to the forms of the statute in such case made and provided."

To this the defendant has demurred, thereby admitting the truth of the allegations contained in the indictment.

The main question is whether a dog is a "domestic animal," for, if he be, the defendant is guilty by his own admission and should be held criminally liable.

A dog is the subject of ownership. Trespass will lie for an injury to him. Trover is maintainable for his conversion. Replevin will restore him to the possession of his master. He may be bought and sold. An action may be had for his price. The owner has all the remedies for the vindication of his rights of property in this animal as in any other species of personal property he may possess.

He is a domestic animal. From the time of the pyramids to the present day, from the frozen pole to the torrid zone, wherever man has been there has been his dog. Cuvier has asserted that the dog was perhaps necessary for the establishment of civil society, and that a little reflection will convince us that barbarous nations owe much of their civilization above the brute to the possession of the dog. He is the friend and companion of his master—accompanying him in his walks, his servant, aiding him in his hunting, the playmate of his children—an inmate of his house, protecting it against all assailants.

It may be said that he was "*ferœ naturœ*," but all animals, naturalists say, were originally "*ferœ naturœ*," but have been reclaimed by man, as horses, sheep, or cattle; but, however tamed, they have never, like the dog, became domesticated in the home, under the roof, and by the fireside of their master.

The dog was a part of the agricultural establishment of the Romans, and is treated of as such. There were the *canes villatici* to guard the villa of the Roman senator, the *canes venatici* accompanying him in his hunting expeditions, and the *canes pastorales* by whom his flocks were guarded. Virgil in his Georgics has given directions as to their management and education. To-day in many countries they are used for draught, as in France and Holland, and everywhere regarded as possessing value and as the subject-matter of traffic.

The language of the statute is most general, "any domestic animal." The words are not technical or words of art. They are the words of the common people and should be construed as such. Nothing would more astonish the people for whom the laws were made than to learn that a bull or a hog was a domestic animal, and that a dog was not.

The lexicographers define a dog as a "domestic animal." "A well-known domestic animal"—Johnson's Dictionary. "A well-known domestic animal of the genus *canis*"—Worcester's Dictionary. In Bouvier's Law Dictionary he is defined as "A well-known domestic animal." Olney, the poet, says of them:—

> "They are honest creatures,
> And ne'er betray their masters, never fawn
> On any they love not."

So, in the encyclopedias he is *canis familiaris*, and called a domestic animal; so that in the ordinary use of language he is within the clear provisions of the statute under which this indictment was found. "The domestic dog has occasioned many legal disputes, and the presumption of the common law of England is that he is tame:" Campbell on Negligence, § 27.

By R. S. c. 6, § 5, a tax is imposed on dogs. This is a distinct and statutory recognition of their being property and having value, and that the owner has the same rights to their protection that he has for anything else he may own. In New York dogs were taxed, and this was held to be a statutory recognition of them as property, and that they were the subjects of larceny. In The People *v.* Maloney, 1 Park (N. Y.) Cr. 598, the Court says that if there was no statute on the subject, they should feel bound by the rules of the common law; but "the revised statutes are inconsistent with the common law rule. By them dogs are so far regarded as property as to be, in certain cases, the subject of taxation. The owner is made liable for the acts of his dog, thus recognizing that the dog has an owner and consequently that the thing owned is property. For every civil purpose, not only by statute, but by the decisions of Courts, a dog is regarded as property." "All of the distinctions as to animals *feræ naturæ*," observes Settle, J, "as to their generous and base natures, which we find in the English books, will not hold good in this country .... We take the true criterion to be the value of the animal, whether for the food of man, for its fur, or otherwise."

In the present case the Newfoundland dog "Rich," of the value of one hundred dollars, was "in the inclosure and immediate care of his master." He was domesticated.

Whether the property of the master was originally of a qualified nature or not, is immaterial. The dog was under his dominion and control. "While this qualified property continues, it is as much under the protection of law as any other property, and every invasion of it is redressed in the same manner:" 2 Kent's Com. 349.

A dog being a "domestic animal" and property, an indictment is maintainable under R. S. c. 127, § 1, for his malicious destruction. When the statute made malicious mischief in-

dictable, it was held that a dog was the subject of absolute property, and the killing of one under the Act prohibiting malicious mischief was an indictable offence: State *v.* Sumner, 2 Porter (Ind.), 377. There is such property in dogs as to sustain an indictment for malicious mischief: State *v.* Latham, 13 Iredell, 33. In State *v.* McDuffee, 34 N. H. 523, which was like this, for maliciously shooting a dog, Fowler, J., says: "We can see no reason why the property of its owner in a valuable dog is not quite as deserving of protection against the wilful and malicious injury of the reckless and malignant as property in fruit, shade, or ornamental trees, whether standing in the garden or yard of their owner or in a public street, or any other species of personal property." Dogs have been included under "Property," and their malicious destruction has been held indictable: 2 Wharton's Cr. Law, 1082. *A fortiori* is it so, when the owner is subject to taxation for his dog.

It is objected that the indictment does not describe the dog as "a domestic animal." But that is not required, if he be one, any more than it would be to say that a bull, a ram, or a sow is a domestic animal. When the statute made it indictable "maliciously" to wound, kill, etc., any horse, cattle, or other "domestic beast," an indictment for wounding a hog without averring that it was a "domestic beast" was held on the English authorities to be good: The State *v.* Enslow, 10 Iowa, 115. If the Court will take cognizance that a hog or a bull is a domestic animal or beast without its averment in an indictment, much more will they that the dog is such animal. Reliance is placed on R. S. c. 30, §§ 2, 3, and 4, which impose certain liabilities on the owners of dogs. But these provisions, instead of sustaining, negative the defence. They imply ownership and liability on the part of the owner. They assume the relationship of the household. They recognize the domesticity of the dog—as having an owner or keeper, and of minors and servants as owners and keepers, and make the parent, guardian, master, or mistress of such minor or servant responsible for the damages done by the dog so owned. The dog appertains to the household of which the master or mistress is made liable for his misdoings. The owner or keeper thus made responsible for the

misdoings of his taxable dog or that of his children should not be left without legal protection when this property is wilfully and maliciously destroyed.

It is true that by § 2 any one may kill a dog under certain conditions therein set forth. But the very section impliedly negatives the right to kill except only when those conditions exist. By its provisions "any person may lawfully kill a dog that assaults him or any other person when peaceably walking or riding," etc., but it gives no general right to kill dogs. The killing is only lawfully done when the person killing is peaceably walking or riding, etc., and not otherwise.

It is said that "if a person is liable to be convicted for killing a dog under c. 127, he may be punished for what he has a legal right to under c. 30." Not so. He cannot be punished under c. 127 if the killing was justified under the provisions of c. 30. The statutes are perfectly consistent.

But it is argued that the indictment should negative the authority to kill in the cases mentioned in § 2. Such is not the law. The indictment follows the statute. It sets forth clearly an offence. If committed, it is for the accused to establish a justification. When the enacting clause of a penal statute describes the offence with certain exceptions, it is necessary to state in the indictment all the circumstances which constitute the offence and to negative the exceptions: State *v.* Keen, 34 Maine, 501. But this principle is not applicable here.

It is to be remarked that the statute, c. 200, of the laws of 1877, requiring the licensing and registration of dogs, and that they should wear a collar round the neck with the owner's name thereon, was repealed by c. 72 of the laws of 1878. If it would have been necessary, had the first named statute been in force, to have set forth in the indictment, as in State *v.* McDuffee, 34 N. H. 527, the facts of such license and registration, which we think it was not, the statute being repealed, those allegations would no longer be required.

The decisions cited in support of the defence do not apply. In Blair *v.* Forehand, 100 Mass. 137, and in other cases in Massachusetts, the killing of the dogs was justified under the police laws of the State authorizing the killing of dogs not

licensed nor having a collar. But there are no such statutes in this State; hence their utter want of applicability.

Exceptions overruled.

DARLINGTON, P. P. 31;
4 Blackstone, 235;
2 Roscoe on Crimiual Evidence, 528;
2 Russell on Crimes, 368.

Not the subject of larceny at common law.
Reg. *v.* Robinson, Bell's C. C. 34;
Lindly *v.* Bear, 8 S. & R. 571.

Civil actions do lie for injuries thereto.
Parker *v.* Mise, 27 Ala. 480;
Woolf *v.* Chalker, 31 Conn. 121;
Wheaton *v.* Harris, 4 Sneed. 456;
Dodson *v.* Mack, 4 Dev. & Bat. 146;
Perry *v.* Phillips, 10 Iredell. 257;
State *v.* McDuffe, 34 N. H. 523;

Destruction of, under police power.
Blair *v.* Foreland, 100 Mass. 136;
Carter *v.* Dow, 16 Wis. 298;
Mitchell *v.* Williams, 27 Ind. 63;
Faribault *v.* Wilson, 34 Minn. 254;
Mullaly *v.* State, 86 N. Y. 365.

Dogs made property within the purview of the criminal code.
G. L. Minn. 1885, Ch. 177.

THE CAT.

WHITTINGHAM *v.* IDESON.
8 Upper Canada L. J. 14.

LONSDALE, J.: This is an action brought by the plaintiff to recover damages for the loss of his cat, killed by defendant, a gamekeeper. The cat was intentionally killed by the defendant, and at the time it was killed was off the premises of the defendant about 200 yards from his residence. As regards the facts there is no dispute; but it was objected at the trial that a person can have no property in a cat, or, at all events, only a qualified property so long as it remains in his actual possession; and that the cat in question, at the time it was killed, being off the premises of the plaintiff, he had no property in it at that time, and therefore is precluded from recovering damages for its destruction. As regards the latter objection, taking cats, as some authorities hold and as was argued by the defendant's attorney, to belong to the class of animals *feræ naturæ*, yet, as they are reclaimed animals, there can be no

pretence for saying that, because the cat in question had wandered 200 yards from the plaintiff's house (being in the habit, as was stated in evidence, of returning home daily), it had, by so doing, reverted to its wild state, and thereby divested the plaintiff of any right of property he might otherwise have had in it; it is therefore unnecessary to consider that objection further. But whether *ferœ naturæ*, or, as other authorities consider them, *domitæ naturæ*, the point to be decided is, whether cats being, as well as dogs and certain other animals, what the law terms, of a base nature, by reason of their not being fit for the food of man, are or are not the subjects of property. For if they are, there is no doubt that trespass will lie for killing them, since damages may be recovered in that form of action for any injury of a forcible kind done to anything whatever in which a man has property. At common law, no animal, with one or two exceptions, such as horses and other beasts of draught, swans, because they are royal birds, hawks and falcons, "on account of their noble and generous nature and courage and as serving *ob vitæ solatium* of princes and noble and generous persons, and as making them fitted for great employments," is the subject of theft, whether *domitæ naturæ* or *ferœ naturæ*, unless it be fit for food. But it does not follow from this that there can be no property in animals which are not fit for food, and that they are not the subject of civil remedies. The reason given by Sir William Russell in his Treatise on Crimes and Misdemeanors why such animals have been held not to be the subjects of theft is "that creatures of this kind, for the most part wild in their nature, and not serving when reclaimed for food, but only for pleasure, ought not, however the owner may value them, to be so highly regarded by the law that for their sakes a man should die." This, no doubt, is the true reason why, in a simple state of society, and when all thefts above the value of a shilling were punished with death, dogs, cats, ferrets, and other like animals were excluded from the law of larceny, and not because a person could have no property in them. But what say the authorities on the point? So far as I know, it has never been the subject of a judicial decision in any of the courts at Westminster.

The only sources, therefore, to which we can have recourse

for information are the text-writers of authority; and the only one who supports the view urged for the defendant at the trial is Mr. Chitty in his work on the Practice of Law. He there lays it down that "Trespass in general lies for taking any animal or bird out of the actual possession of a person who has secured the same; but no action lies for enticing from the premises of the owner, and afterwards killing or injuring, a cat, which is not considered of any value in law." He quotes no authority for this statement, and, so far as I have been able to ascertain, it is wholly unsupported by any. The reason he gives why no action will lie for enticing a cat from the premises of its owner and then killing it is, that it is not considered of any value in law; but if this be so, one does not see why it should be actionable to take a cat out of the actual possession of a person, since the cat must be equally valueless in the one case as in the other. Perhaps, however, by "out of the actual possession" he means from off the premises, or out of the manual possession of the owner, and that in those cases the action is really for the trespass against his premises or person, and not for the taking of the cat. If it were not that he gives as a reason why an action will not lie, that a cat is of no value in law, one might infer that he intended that as soon as a cat leaves its owner's premises it ceases to be his property. And this might be good law if cats were not reclaimed animals; but this, at all events, those authorities who class cats amongst animals *ferœ naturæ*, allow them to be, so that they cannot regain their natural liberty so long as they have *animum revertendi*, of which the mere fact of their straying from the owner's premises is no evidence to the contrary. This reason given, therefore, by Mr. Chitty for the law as he states it, is not altogether intelligible; at all events it is not clearly expressed. On the other hand, BLACKSTONE, J., in his Commentaries, after remarking that it is not felony at common law to steal such animals *ferœ naturæ* though reclaimed, as "are only kept for pleasure, curiosity, or whim, as dogs, bears, cats, apes, parrots, and singing-birds, because their value is not intrinsic, but depending only on the caprice of the owner," adds, but "it is such an invasion of property as may amount to a civil injury, and be redressed by a civil action." So also in another passage

he says: "As to those animals which do not serve for food, and which, therefore, the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim or pleasure, though a man may have a bare property therein, and maintain a civil action for the loss of them, yet they are not of such estimation, as that the crime of stealing them amounts to larceny." It is clear, therefore, that it was the opinion of BLACKSTONE, J., that there may be a property in cats. In Bacon's Abridgment of the Law it is also laid down that "an action of trespass lies for taking or killing a dog; because as a dog is a tame animal, there may as well be a property therein as in any other animal." This, though dog only is mentioned, is equally an authority for a cat being property; for cats and dogs are always treated as belonging, in law, to the same class of animals, and are held not to be subjects of larceny for one and the same reason. But in addition to this passage there is another, in the same author, which clearly includes cats. It is there said, "If a beast or bird which is *ferœ naturœ* have been reclaimed, this action (trespass) lies for the taking or killing thereof, because there is a property in the beast or bird." Toller in his Law of Executors also says: "Since the executor's interest is co-extensive with that vested in the testator, the property in all his animals, however minute in point of value, shall go to the executor, as house-dogs, ferrets, and the like, or although they were kept only for pleasure, curiosity, or whim, as lap-dogs, squirrels, parrots, and singing-birds." The description in this passage of the animals which will go to the executor is almost in the words of BLACKSTONE, J., which I have quoted. It is true that it does not make special mention of cats; but there cannot be a doubt they were intended to be included under the expression "and the like." Lastly, the Criminal Law Commissioners, one of whom was the present WIGHTMAN, J., and two others, the late Mr. Starkie and the late Mr. Amos, both very learned lawyers, and both of them Judges of county courts, and Downing, Professor of Law at Cambridge, in their first report in observing upon the reason why animals *ferœ naturœ*, which are not fit for food, are not the subjects of larceny, although reclaimed, say: "It would seem that the rule upon this subject arose from the circumstance that

the animals above specified, viz.: bears, foxes, apes, monkeys, pole-cats, cats, and dogs, etc., being unfit for food, were not formerly marketable and of a determinate value. But they are all now the subject of a civil remedy for property. With this great weight of authority against Mr. Chitty's single dictum, I have no hesitation in giving it as my opinion that a person may have a property in a cat, and, therefore, that an action will lie to recover damages for killing it. There may be circumstances under which it would be justifiable to kill a cat; but it is not justifiable to do so merely because it is a trespasser, even though after game. These facts alone were not sufficient, in my opinion, to justify the defendant in killing it. As connected with the question of property in cats, I may mention that cats were looked upon by our ancestors, the ancient Britons, as creatures of intrinsic value, and the killing or even stealing of them a grievous crime, and subjected the offender to a fine. And if the cat belonged to the king's household, and was kept for the purpose of destroying the rats or mice in the royal granary, it was protected by the following curious law: "If any one shall steal or kill a cat, being the guardian of the king's granary, let the cat be hung up by the tip of its tail, with its head touching the floor, and let grains of wheat be poured upon it until the extremity of its tail be covered with the wheat." As much wheat as would be required for this purpose was the measure of the forfeiture to which the offender was liable.

Being of opinion that this action is properly brought, I have next to consider whether the amount of damages claimed, £2, is warranted by the facts proved in evidence. In actions of trespass, unattended by circumstances of aggravation, the proper measure of damages, where any article has been destroyed, is the market value of the article so destroyed; but in the case of an ordinary domestic cat, like the one to which the present action refers, it is very difficult to say what is its market value, such cats being seldom sold. There can be no doubt as a general rule, even in the case of good mousers, a few shillings would be considered a sufficient price. Was then the killing of the cat in question attended by any circumstances of aggravation? Where the measure of damages is the mere

worth of the thing injured, the injury must be unintentional; if wilfully occasioned, that would be a circumstance of aggravation, and would justify a jury in giving damages beyond the mere money value of the thing injured. In the present case the killing of the cat was intentional; I must, therefore, give something for damages on that account, beyond the few shillings which otherwise I should have considered sufficient; but as the defendant may have thought, in the present not very clear state of the law on the subject, that he was justified in killing the cat for the protection of his master's game, I should not go so far as I should otherwise have done, or as I should have done if he had killed it to annoy the plaintiff, or to gratify any feeling of spite or revenge. Under all the circumstances I think if I direct judgment to be entered for 10*s.*, I shall do all that the justice of the case requires. Let judgment, therefore, be entered for that amount.

Note. "The Animal Kingdom in Court." 2 Al. Law J. 101.

LOST PROPERTY.

I.

The finder of lost property acquires a good title thereto as against everybody but the true owner.

HAMAKER *v.* BLANCHARD.

Supreme Court of Pennsylvania, 1879.

90 Penn. St. 377.

TRUNKEY, J.: It seems to be settled law that the finder of lost property has a valid claim to the same against all the world except the true owner, and generally that the place in which it is found creates no exception to this rule. But property is not lost, in the sense of the rule, if it was intentionally laid on a table, counter, or other place by the owner, who forgot to take it away, and in such case the proprietor of the premises is entitled to retain the custody. Whenever the surrounding evidence that the article was deposited in its place, the finder has no right of possession against the owner of the building: McAvoy *v.* Medina, 11 Allen (Mass.), 548. An article casually dropped is within the rule. Where one went into a shop, and, as he was leaving, picked up a parcel of bank notes which was lying on the floor, and immediately showed them to the shopman, it was held that the facts did not warrant the supposition that the notes had been deposited there intentionally, they being manifestly lost by some one; there were no circumstances in the case to take it out of the general rule of law that the finder of a lost article is entitled to it as against all persons except the real owner: Bridges *v.* Hawkesworth, 7 Eng. Law & Eq. R. 424.

The decision in Mathews *v.* Harsell, 1 E. D. Smith (N. Y.), 393, is not in conflict with the principle, nor is it an exception. Mrs. Mathews, a domestic in the house of Mrs. Barmore, found

some Texas notes, which she handed to her mistress to keep for her. Mrs. Barmore afterwards intrusted the notes to Harsell for the purpose of ascertaining their value, informing him that she was acting for her servant, for whom she held the notes. Harsell sold them and appropriated the proceeds, whereupon Mrs. Mathews sued him and recovered their value, with interest from date of sale. Such is that case. True, Woodruff, J., says: "I am by no means prepared to hold that a house-servant who finds lost jewels, money, or chattels in the house of his or her employer, acquires any title even to retain possession against the will of the employer. It will tend much more to promote honesty and justice to require servants in such cases to deliver the property so found to the employer, for the benefit of the true owner." To that remark, foreign to the case as understood by himself, he added the antidote: "And yet the Court of Queen's Bench in England have recently decided that the place in which a lost article is found does not form the ground of any exception to the general rule of law that the finder is entitled to it against all persons except the owner." His views of what will promote honesty and justice are entitled to respect, yet many may think Mrs. Barmore's method of treating servants far superior.

The assignments of error are to so much of the charge as instructed the jury that, if they found the money in question was lost, the defendant had no right to retain it because found in his hotel, the circumstances raising no presumption that it was lost by a guest, and their verdict ought to be for the plaintiff. That the money was not voluntarily placed where it was found, but accidentally lost, is settled by the verdict.

It is admitted that it was found in the parlor, a public place open to all. There is nothing to indicate whether it was lost by a guest, or a boarder, or one who had called with or without business. The pretence that it was the property of a guest, to whom the defendant would be liable, is not founded on an act or circumstance in evidence.

Many authorities were cited in argument, touching the rights, duties, and responsibilities of an inn-keeper in relation to his guests; these are so well settled as to be uncontroverted. In respect to other persons than guests, an innkeeper is as another man. When money is found in his house, on the floor

of a room common to all classes of persons, no presumption of ownership arises. The case is like the finding upon the floor of a shop. The research of counsel failed to discover authority that an innkeeper shall have an article which another finds in a public room of his house, where there is no circumstance pointing to its loss by a guest. In such case the general rule should prevail. If the finder be an honest woman, who immediately informs her employer, and gives him the article on his false pretence that he knows the owner and will restore it, she is entitled to have it back and hold it till the owner comes. A rule of law ought to apply to all alike. Persons employed in inns will be encouraged to fidelity by protecting them in equality of rights with others.

The learned Judge was right in his instructions to the jury.

Judgment affirmed.

DARLINGTON, P. P. 35;
2 Blackstone, 402; 1 Id. 296;
2 Kent, 356;
Armory *v.* Delamirie, 1 Strange, 505;
Bowen *v.* Sullivan, 62 Ind. 281;
Tancil *v.* Sleaton, 28 Gratt. 601;
McAvoy *v.* Medina, 11 Allen, 548;
Bridges *v.* Hawksworth, 7 Eng. L. & Eq. 424;
Durfee *v.* Gaines, 11 R. I. 588;
Waterman *v.* Johnson, 13 Pick. 255;
Merry *v.* Green, 7 M. & W. 623;
Tatum *v.* Sharpless, 6 Phila. 18;
Lawrence *v.* Buck, 62 Me. 275;
N. Y. & H. R. R. R. Co. *v.* Hawes, 56 N. Y. 175;
Pinkham *v.* Gear, 3 N. H. 485.

II.

The finder of lost property has no legal claim to recompense for finding the same against the owner thereof.

Watts *v.* Ward.

Supreme Court of Oregon, 1854.

1 Oregon, 817.

Williams, C. J.: The instruction of the Court, it is said, was erroneous. No doctrine is better settled at common law than

that the finder of lost property is not entitled to a reward for finding it, if there be no promise of such reward by the owner: Brinstead *v.* Buck, 2 Black. 1117; Nicholson *v.* Chapman, 2 H. Black. 254; 2 Kent's Com. 356; 5 Met. 352. Some of the authorities maintain that the finder of lost property is entitled to recover from the owner thereof his necessary and reasonable expenses in the finding and restoration of said property: Amory *v.* Flinn, 10 Johns. 102; 2 Kent's Com. 356. Other authorities seem to take the ground that the finder has no legal right to anything from the owner for his trouble and expense in finding lost property. Brinstead *v.* Buck, Nicholson *v.* Chapman, before cited, appear to stand upon this principle. Chief Justice Eyre, speaking upon this subject in the latter case, says: "Perhaps it is better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude."

Chief Justice Shaw, in Wentworth *v.* Day, 5 Met. 352, says that "the finder of lost property on land has no right of salvage at common law." Where one person gratuitously performs an act of kindness for another, the law, as a general rule, does not recognize the right to a compensation for such act. In the case of Holmes *v.* Tremper, 20 Johns. R. 28, it was held that the plaintiff was not entitled to any recompense for services rendered in saving defendant's property from fire, because such services were entirely voluntary, and without any express or implied promise on the part of defendant to pay for them. No person is bound in law to take trouble with property which he finds; and if, without any knowledge of the owner's wishes, he does incur expense on account of such property, does he not in so doing trust the liberality of the owner rather than the force of law, for it may be that such owner did not desire to have his property disturbed, or, if lost, preferred to find it himself? Much of the stock in this country is permitted to run at large; and if every animal lost, or appearing to be lost, can be taken up and the owner thereof legally charged for all trouble and expense thereby incurred, the business of finding cattle would certainly become profitable, and persons might be largely involved in debt without their knowledge or consent.

Where a reward is offered for lost property, the finder, when he complies with the terms of the offer, has a right to retain the property in his hands until the promised reward is paid to him: Wentworth *v.* Day, 5 Met. 352. Persons are apt to offer a reward if they wish to pay for the finding of lost property. All the authorities make a difference between the finding of property lost at sea and the finding of property lost on land. Commercial policy allows salvage in the one case, because there is peril in the finding, and immediate destruction threatens the property; in the other case there is no peril, and generally no danger that the property will be destroyed. But, if it be admitted that the owner of lost property is bound to remunerate the finder for his trouble and expense in the finding, it is certain that such finder cannot pay himself as he goes along using the property for that purpose. He cannot be permitted to judge as to how much his demand for trouble and expense shall be, and then as to how much he ought to use the property to satisfy such demand. The owner has rights in these matters, and must be consulted.

Let the property, when found, be returned to the owner, and then the amount and mode of compensation, if any, can be determined. Plaintiffs in this case having treated and used the horses as their own, for their own benefit and gain, defendant had a right to charge them with a conversion of the property, and maintain his suit for its value.

Judgment affirmed.

III.

Has the finder a legal claim for necessary and reasonable expenses in caring for and advertising the thing found?

Reeder *v.* Anderson.

Supreme Court of Kentucky, 1836.

4 Dana (Ky.), 193.

Robertson, C. J.: The only question to be considered in this case is, whether the law will imply a promise by the owner of

a runaway slave to pay a reasonable compensation to a stranger for a voluntary apprehension and restitution of the fugitive. And, though such friendly offices are frequently those only of good neighborship, which should not be influenced by mercenary motives or expectations, nevertheless, it seems to us that there is an implied request from the owner to all other persons to endeavor to secure to him lost property which he is anxious to retrieve; and that, therefore, there should be an implied undertaking to (at least) indemnify any person who shall, by the expenditure of time or money, contribute to a reclamation of the lost property.

Whether, according to the proof, there was any such claim to reparation or indemnity in this case, is very doubtful: but, because it is doubtful, the Circuit Court erred in instructing the jury to find as in case of a nonsuit.

And therefore, it is considered by the Court that the judgment be reversed, the verdict set aside, and the cause remanded for a new trial.

2 Kent, 356–7;
Schouler on Bailments, § 28;
Story on Bailments, § 121 a; § 621 a;
Schouler, P. P. Vol. 2, § 14;
Etter *v.* Edwards, 4 Watts, 63;

Dicta:—
Armory *v.* Flynn, 10 John. 102;
Marvin *v.* Treet, 37 Conn. 96;
Mill Creek, etc., *v.* Brighton, etc., Co., 27 Oh. St. 435;
Baker *v.* Hoag, 3 Barb. 203;
Nicholson *v.* Chapman, 2 H. Blackstone, 254;
Binstead *v.* Buck, 2 W. Blackstone, 1117.

IV.

The finder has no lien upon the thing found for such recompense.

Wood *v.* Pierson.

Supreme Court of Michigan, 1881.

45 Michigan, 313.

Graves, J.: Pierson sued in replevin and obtained judgment, and Wood and Chapman filed a bill of exceptions and brought

error. The subject of the action was a breastpin found by Chapman and claimed by Pierson. Many of the facts are not disputed. Pierson lost at Bay City, July 18, 1878, a small diamond pin, which seems to have separated from the tongue in some unknown way. The circumstances of the loss and the manner in which the body of the pin and tongue became disunited are left unexplained. The metallic setting was a common pattern, and the gem had no peculiarities to facilitate its identification by non-experts. Pierson caused a notice to be inserted in the Tribune newspaper published in the city, of this tenor:—

"LOST.

"$25 REWARD—LOST.—A diamond pin. The finder will be paid the above reward by leaving the same at this office."

As will be observed, the advertisement neither gave a description of the pin nor suggested who offered the reward. Moreover, no means of any kind were provided for showing at the newspaper office the ownership or identity of the pin, or for connecting any pin which might be produced with the claim contained in the notice, nor was any money left with which to pay the reward, nor any provision whatever made for paying it there.

Chapman found a pin which was subsequently ascertained to be the one in question. His first impression was, when he picked it up, that it was a cheap trinket, but on second thought he decided to show it to a jeweler. Dirt was adhering to it, and attention was at once drawn to the fact that, although the tongue was wholly missing, the rivet was secure and firmly in its place. The query naturally arose as to how this condition of the pin and the absence of the tongue might be accounted for. But in order to find out whether it had any material value, Chapman took it immediately to Wood, the other defendant, he being a jeweler, and was by him told that the stone was a diamond, and that a diamond pin had been advertised in the Tribune.

On getting this information Chapman went at once to the newspaper office and saw Mr. Shaw, the editor and manager, who showed him the advertisement and informed him who the

author was. Mr. Shaw referred him for anything further to Mr. Pierson, and he at once carried the pin to Pierson's store and called for that gentleman. He was absent. Chapman was going from the city the next morning, and he told a clerk, Mr. Martin, that he had found a pin, and, as he was going away, he would leave it at Mr. Wood's to be identified and returned to the owner. He then went to Wood's, and there left it with instructions to give it to the person who should identify it and pay the reward, and to no one else. This was Friday evening, July 26. The next morning he went from the city on business, and only returned the Monday following at noon. During his absence Pierson called on Wood and asked to see the pin in order to identify it, and Wood declined and required him to identify it first. Pierson attempted to do so, but he failed to satisfy Wood, and in the judgment of another jeweler to whom both referred, and who had the advantage of inspecting both the tongue and body of the pin and of comparing them, the physical appearances and indications were strongly against Pierson's claim.

In respect to what was said at these interviews there was want of harmony in the testimony. Pierson requested that another jeweler at Bay City, who, he said, had formerly repaired the pin, and had a plaster cast of the stone and could identify it, might be permitted to see it. But Wood proposed that this gentleman should call with his mould, and he, Wood, could then see for himself whether it fitted or not. The gentleman came, but had no cast, and was unable to give a particular description, and Wood declined to show the pin to him. Pierson then proposed that the pin should be sent at his expense for the purpose of identification to Mr. Smith, of Detroit, who, he said, had mounted it. This was declined, and Wood suggested that Pierson should write to Smith for a description, an expedient, he observed, which would be attended with less risk, but this proposal was unacceptable to Pierson.

The testimony disagreed as to the incidents of the effort to get the question of identification settled through Mr. Smith, and in regard to what took place between Pierson and Chapman after the return of Chapman on the 29th. On Tuesday,

the 30th of July, Pierson sued out the writ of replevin and went with the sheriff to Wood's store to get the pin. It was not produced, and indeed was not then in the store, although the fact was not made known by Mr. Wood. It is unnecessary to recite the different versions of what took place. On the next morning, Wednesday, the 31st, Mr. Chapman carried the pin to Detroit and satisfactorily ascertained at Mr. Smith's that it was the one advertised for by Mr. Pierson. He returned on Thursday, and on Friday, the day after, met the officer and handed the pin to him, with the request to get the reward. Pierson refused to pay it, and on giving the usual replevin bond received the pin from the officer.

It has seemed proper to go into this detail on account of the singularities of the case. Yet it must not be assumed that the outline given lends the exact coloring to the transaction which would be perceptible to a jury on hearing the whole testimony. At the first glance every one must admit that as to one feature of the case, at least, there can be no doubt. The facts are conclusive that the parties dispensed with the newspaper office as a place for doing what should be necessary in consequence of the reward. Pierson in the first place neglected preparations which were incumbent on him as a legal preliminary to holding Chapman to a compliance at that place, and Chapman did not insist on performance there. Both parties proceeded on the tacit understanding that whatever was to be done should be done elsewhere. So much is too clear to admit discussion, and neither party is at liberty to claim any advantage on account of the omission to transact or perform at the printing office.

According to the common law, the finder of goods lost on land becomes proprietor in case the true owner does not appear. And meanwhile his right as finder is a perfect right against all others. But if the true owner does appear, whatever right the finder may have against him for recompense for the care and expense in the keeping and preservation of the property, his status as finder only does not give him any lien on the property. Yet if such owner offer a reward to him who will restore the property, a lien thereon is thereby created to the extent of the reward so offered. This doctrine in favor of a lien in such circumstances is so laid down in Preston *v.* Neale, 12 Gray,

222, and authorities are cited for it. Among them is the leading case of Wentworth *v.* Day, by Chief Justice Shaw, reported in 3 Metcalf, 352, and which is approved and followed by the Supreme Court of Pennsylvania in Cummings *v.* Gann, 52 Penn. St. 484, adopted as correct by Story in his work on Bailments, §§ 121, and 621 a. Parsons has given it his sanction by incorporating it in the text of his work on Contracts (vol. 3, p. 239, 6th ed.), and Edwards presents it as settled law in his treatise on Bailments, §§ 20, 68 (2d ed.).

Under this principle the admission is unavoidable that when Pierson claimed the pin, on the footing of his notice and reward, of Chapman, the finder, who was holding it for the actual owner, it was, as between them, subject to a lien in Chapman's favor and against Pierson for the reward. According to the language of the books, Chapman was entitled to detain the article from Pierson until the reward should be paid, and was under no legal obligation to relinquish possession to him, or to give it to another, or to allow anything to be done endangering his right or security. But there was a mutuality of rights. As claimant, Pierson was entitled to a reasonable time and to fair and reasonable opportunity in reference to the nature of the chattel, the existing state of things bearing on the transaction and the surrounding circumstances, and without impairing Chapman's right as contingent owner, nor his right of lien, nor interfering with his duty to the true ownership which might be subsequently asserted by another, to make such a showing as he could that the property was the same he had lost and advertised, and such evidence as would satisfy a fair and reasonable person of the fact.

It was not for Chapman to baffle investigation by any unfair action or inaction, or give way to unfounded and unreasonable suspicion, and then object that the evidence of identification was not sufficient. Nor was it for Pierson to demand anything which was not fair and just under the circumstances, and needful for investigation, and consistent with Chapman's rights and duties, and then make its refusal a pretext for charging injustice, and an excuse for making costs; and in regard to these and similar matters it was for the jury to say what was the conduct of the parties; whether it was fair and reasonable or

otherwise; whether either or both materially deviated from the proper course; whether the kind of reciprocity the occasion called for was shown or not, and whether Chapman was bound or not to be satisfied of the rectitude of Pierson's claim when the suit was begun.

Whether as between the parties and in view of all the considerations bearing on their rights and duties, and on the conveniences and inconveniences of identification growing out of the nature of the property, and bearing on the chances for imposition, and on the fact of Chapman's being liable to account to whoever should at last be found to be actual owner, it was reasonably and fairly due to Pierson to have a personal inspection to enable him to say that the pin was, or was not, his property, and if he thought it was, then to facilitate his proof, was not a matter of law. It depended on the peculiarities of the case, and was a question for the jury under instructions conforming to the principles here explained.

For the purpose of judging with what propriety the parties acted, and whether Chapman was guilty of legal fault, the transaction must be contemplated as it was on the 30th of July when the action commenced. It is necessary to keep in mind what time had then been taken, and what had been done about identifying the pin, and what evidence Chapman had of the validity of Pierson's claim. That satisfactory evidence was procured afterwards by Chapman must not be taken to show that he had fair and reasonable evidence before, or that his prior conduct was unjust. In considering this aspect of the controversy, it is necessary to confine attention to the facts and appearances manifested up to the time the writ was taken out. The question was then pending and unsettled.

The contention touching the right of action in the absence of any tender of the reward is of no practical importance on this record. Whether in point of fact Chapman waived or abandoned the reward itself, would be a question for the jury under proper instructions. Inasmuch as it belonged to Pierson to identify the property, and pay the reward too, it is not reasonable to contend that, because Chapman insisted on the identification, he therefore waived the reward. The exaction of the first, or even a firm stand on every legal advantage concerning

identification, would not imply relinquishment of the other. Unless the reward itself was in fact waived, or there was such behavior on the part of Chapman respecting Pierson's reclamation as was tantamount to a denial of Pierson's right and a wrongful detention, it is not perceived that there was any ground for holding that the lien was forfeited.

In Isaack *v.* Clark, 2 Bulstrode, 306, Lord COKE states the law in this wise: "When a man doth finde goods, it hath been said, and so commonly held, that if he doth dispossess himself of them, by this he shall be discharged; but this is not so, as appears by 12 E. IV., fol. 13, for he which findes goods is bound to answer him for them who hath the property; and if he deliver them over to any one, unless it be unto the right owner, he shall be charged for them, for at the first it is in his election whether he will take them or not into his custody, but when he hath them, one onely hath then right unto them, and, therefore, he ought to keep them safely; if a man, therefore, which findes goods, if he be wise, he will then search out the right owner of them, and so deliver them unto him; if the owner comes unto him and demands them, and he answers him, that it is not known unto him whether he be the true owner of the goods or not, and for this cause he refuseth to deliver them, this refusal is no conversion, if he do keep them for him."

Lord Coke very clearly enforces the right and duty of the finder to be certain of the true owner before he makes delivery. As he is bound to hold for the true owner, and is liable in case of misdelivery, the law makes it his duty as well as his right, even when there is no reward, to "search out," or, in other language, find the "right owner," or see to it that he submits to no other than the "right owner." Undoubtedly if Chapman's conduct was such that a jury would, under the circumstances of the case, feel satisfied that he was actually perverse and unreasonable, and pursued a course which was adopted to baffle fair investigation, instead of maintaining the attitude of a man whose duty it was, in the quaint terms of Lord Coke, to "search out the right owner," it would be just to regard him as having detained the property unlawfully.

The neglect to tender the reward, if it was still claimed, could not defeat the action: Bancroft *v.* Peters, 4 Mich. 619.

The remedy of trover was originally given to enable the loser of goods to recover of the finder, and the principle has found recognition in one of the provisions of our action of replevin: Comp. L. § 6754. The statute expressly refers to a case where one party is found to have a lien, and the other the general ownership, and the Court is required to render such judgment as shall be just. The provision did not escape the attention of the Court below. It was mentioned in the charge. The parties respectively ignored the statute concerning lost property and planted themselves on the common law, and hence there seems to be no occasion to notice the former.

The charge given by the learned Judge was very elaborate. In some essential particulars it seems open to a construction not consistent with the views which are here explained. But it is not needful to specify the observation referred to.

It is enough to say now, that whatever may have been intended, the charge as we find it in the record must have been received by the jury as instructing them that the defendants were bound to submit the pin to the personal inspection of the plaintiff on his request, as a safe and proper expedient for the purpose of "searching out the right owner," and they could not have supposed that it was submitted to them to decide according to their own judgment of the circumstances whether the defendants ought or ought not to have allowed such inspection. The question was not for the bench, but for the jury under suitable instructions.

The case has several features which demand a very strict adherence to the rule which restricts the province of the Judge to the conveyance of such matters of law to the jury as the case calls for, and assigns to the jury the determination of all matters of fact. No doubt the unusual, if not unprecedented characteristics of the litigation, and the ordinary hurry of a trial, may explain all of the incidents which on careful review appear to be incapable of support.

The result reached is that the judgment must be reversed with costs, and a new trial granted.

2 Kent, 290.

V.

But he has such lien if a certain reward has been offered for the restoration of the thing lost, and the finder sought for and found the thing in view of such reward.

WENTWORTH *v.* DAY.

Supreme Judicial Court of Massachusetts, 1841.

3 Metcalf, 352.

SHAW, C. J. Although the finder of lost property on land has no right of salvage at common law, yet if the loser of property, in order to stimulate the vigilance and industry of others to find and restore it, will make an express promise of a reward, either to a particular person, or, in general terms, to any one who will return it to him, and in consequence of such offer one does return it to him, it is a valid contract. Until something is done in pursuance of it, it is a mere offer, and may be revoked. But if, before it is retracted, one so far complies with it as to perform the labor for which the reward is stipulated, it is the ordinary case of labor done on request, and becomes a contract to pay the stipulated compensation. It is not a gratuitous service, because something is done which the party was not bound to do, and without such offer might not have done: Symmes *v.* Frazier, 6 Mass. 344.

But the more material question is whether, under this offer of reward, the finder of the defendant's watch, or the father, who acted in his behalf and stood in his right, had a lien on the watch, so that he was not bound to deliver it till the reward was paid.

A lien may be given by express contract, or it may be implied from general custom, from the usage of particular trades, from the course of dealing between the particular parties to the transaction, or from the relations in which they stand, as principal and factor: Green *v.* Farmer, 4 Bur. 2221. In Kirkman *v.* Shawcross, 6 T. R. 14, it was held that where certain dyers gave general notice to their customers that on all goods received

for dyeing after such notice they would have a lien for their general balance, a customer dealing with such dyers after notice of such terms must be taken to have assented to them, and thereby the goods became charged with such lien by force of the mutual agreement. But in many cases the law implies a lien from the presumed intention of the parties, arising from the relation in which they stand. Take the ordinary case of the sale of goods, in a shop or other place, where the parties are strangers to each other. By the contract of sale the property is considered as vesting in the vendee; but the vendor has a lien on the property for the price, and is not bound to deliver it till the price is paid. Nor is the purchaser bound to pay till the goods are delivered. They are acts to be done mutually and simultaneously. This is founded on the legal presumption that it was not the intention of the vendor to part with his goods till the price should be paid, nor that of the purchaser to part with his money till he should receive the goods. But this presumption may be controlled by evidence proving a different intent, as that the buyer shall have credit or the seller be paid in something other than money.

In the present case the duty of the plaintiff to pay the stipulated reward arises from the promise contained in his advertisement. That promise was that whoever should return his watch to the printing-office should receive twenty dollars. No other time or place of payment was fixed. The natural if not the necessary implication is that the acts of performance were to be mutual and simultaneous; the one to give up the watch on payment of the reward, the other to pay the reward on receiving the watch. Such being, in our judgment, the nature and legal effect of this contract, we are of opinion that the defendant on being ready to deliver up the watch had a right to receive the reward in behalf of himself and his son, and was not bound to surrender the actual possession of it till the reward was paid; and, therefore, a refusal to deliver it without such payment was not a conversion.

It was competent for the loser of the watch to propose his own terms. He might have promised to pay the reward at a given time after the watch should have been restored, or in any other manner inconsistent with a lien for the reward on the

article restored, in which case no such lien would exist. The person restoring the watch would look only to the personal responsibility of the advertiser. It was for the latter to consider whether such an offer would be equally efficacious in bringing back his lost property as an offer of a reward secured by a pledge of the property itself; or whether, on the contrary, it would not afford to the finder a strong temptation to conceal it. With these motives before him he made an offer to pay the reward on the restoration of the watch; and his subsequent attempt to get the watch without performing his promise is equally inconsistent with the rules of law and the dictates of justice.

The circumstance in this case that the watch was found by the defendant's son, and by him delivered to his father, makes no difference. Had the promise been to pay the finder, and the suit was brought to recover the reward, it would present a different question. Here the son delivered the watch to the father, and authorized the father to receive the reward for him. If the son had a right to detain it, the father had the same right, and his refusal to deliver it to the owner without payment of the reward was no conversion.

Judgment for the defendant.

DARLINGTON, P. P. 49;
Prescott *v.* Neale, 12 Gray, 222;
Cummings *v.* Gann, 52 Pa. St. 484;
Wilson *v.* Guyton, 8 Gill, 213.

If only part is found, the reward must be paid *pro rata*.

Deslondes *v.* Wilson, 5 La. 397; S. C. 25, A. D. 187, n.

But not so where a liberal reward is offered.

DARLINGTON, *supra;*
1 Cooley's Blackstone, Ch. 8, 295, n;
Wilson *v.* Guyton, *supra.*

VI.

If the property is accidentally left in a certain place, or put safely away and forgotten, it is not strictly "lost property."

McAvoy *v.* Medina.

Supreme Judicial Court of Massachusetts, 1866.

11 Allen, 548.

Dewey, J. It seems to be the settled law that the finder of lost property has a valid claim to the same against all the world except the true owner, and generally that the place in which it is found creates no exception to this rule: 2 Parsons on Con. 97; Bridges *v.* Hawkesworth, 7 Eng. Law & Eq. R. 424.

But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safe keeping of the same until the owner should call for it. In the case of Bridges *v.* Hawkesworth the property, although found in a shop, was found on the floor of the same, and had not been placed there voluntarily by the owner, and the Court held that the finder was entitled to the possession of the same, except as to the owner. But the present case more resembles that of Lawrence *v.* The State, 1 Humph. (Tenn.) 228, and is indeed very similar in its facts. The Court there take a distinction between the case of property thus placed by the owner and neglected to be removed, and property lost. It was there held that "to place a pocket-book upon a

table and to forget to take it away is not to lose it, in the sense in which the authorities referred to speak of lost property."

We accept this as the better rule, and especially as one better adapted to secure the rights of the true owner. In view of the facts of this case, the plaintiff acquired no original right to the property, and the defendant's subsequent acts in receiving and holding the property in the manner he did does not create any.

Exceptions overruled.

Lawrence *v.* The State, 1 Humph. (Tenn.) 228; Livermore *v.* White, 74 Me. 452; Cincade *v.* Eaton, 98 Mass. 139.

VII.

A person who, finding lost property, with felonious intent conceals or converts it to his own use, knowing at the time he finds it, or having means of ascertaining, the owner thereof, is guilty of larceny.

BAKER *v.* THE STATE.

Supreme Court of Ohio, 1876.

29 Ohio St. 184.

MCILVAINE, J. The testimony offered on the trial below shows that on the evening of April 28, 1872, the defendant below found on a country public road, at Van Wert County, a pocket-book containing one ten-dollar bill, at a point in the road near which he had been engaged at work during the day, and that the goods found had been lost by the owner, Hinton Alden, at that point a few hours before. That Alden, at the time he lost the pocket-book, had been detained at that point for a short time, and within plain sight of the defendant. On the next morning, Alden, who lived in the immediate neighborhood, informed the defendant of his loss, but defendant concealed the fact of finding, and afterwards expended the money in the purchase of clothing. A few days after, the defendant admitted to a witness in the case that he had found the pocket-book, and that he knew the owner; and on

inquiry why he had not returned the goods to the owner, replied that "Finders are keepers." It was also shown by an admission of defendant, that the appearance of the pocket-book at the time he found it indicated that it had been very recently lost. The law of this case is well stated by Baron Parke, in Regina *v.* Thurborn, 1 Dennison C. C. 387; also reported under the name of Regina *v.* Wood, 3 Cox C. C. 453, thus: "If a man find goods that have actually been lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing when he takes them that the owner can not be found, it is not larceny. But if he takes them with like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny."

The fact, in this case, that the defendant expended the money after he had certain knowledge of the owner, did not render him guilty of larceny, if the offence was not complete before. The loss and finding of the goods were not disputed in the Court below, but the following questions were made: 1. When the defendant first took the goods upon the finding, did he intend to appropriate them to his own use? This question was fairly found against him, from the fact of concealing the finding when informed by the owner of his loss, and from his subsequent declaration that "Finders are owners." 2. Did he have reasonable grounds to believe, at the time of finding the goods, that the owner could be found? It was sufficiently proved that the defendant knew that the goods had been recently lost before the finding, and that Alden had recently been at the point where he found them. These facts constituted reasonable ground for believing that Alden was the owner.

Judgment affirmed.

State *v.* Levy, 23 Minn. 104;
State *v.* Weston, 9 Conn. 527;
Lyder *v.* People, 1 Ill. 293:
Lane *v.* People, 5 Gilm. 305;
Reg. *v.* Knight, 12 Cox C. C. 102;
Bailey *v.* The State, 52 Ind. 462;
S. C. 21 A. R. 182;
People *v.* Anderson, 14 John. 294;
People *v.* Gogdell, 1 Hill, 94;
State *v.* Weston, 9 Conn. 527;

TO SAME POINT.

COMMONWEALTH *v.* TITUS.

Supreme Judicial Court of Massachusetts, 1874.

116 Mass. 42.

GRAY, C. J.: The rulings and instructions at the trial were quite as favorable to the defendant as the great weight, if not the unanimous concurrence, of the cases cited on either side at the argument would warrant.

The finder of lost goods may lawfully take them in his possession, and if he does so without any felonious intent at that time, a subsequent conversion of them to his own use, by whatever intent that conversion is accomplished, will not constitute larceny. But if, at the time of first taking them into his possession, he has a felonious intent to appropriate them to his own use and to deprive the owner of them, and then knows or has the reasonable means of knowing or ascertaining, by marks on the goods or otherwise, who the owner is, he may be found guilty of larceny.

It was argued for the defendant that it would not be sufficient that he might reasonably have ascertained who the owner was; that he must at least have known at the time of taking the goods that he had reasonable means of ascertaining that fact. But the instruction given did not require the jury to be satisfied merely that the defendant might have reasonably ascertained it, but that at the time of the original taking he either knew or had reasonable means of knowing or ascertaining who the owner was. Such a finding would clearly imply that he had such means within his own knowledge, as well as within his own possession or reach, at that time.

It was further argued that evidence of acts of the defendant, subsequent to the original finding and taking, was wrongly admitted, because such acts might have been the result of a purpose subsequently formed. But the evidence of the subsequent acts and declarations of the defendant was offered and

admitted, as the bill of exceptions distinctly states, for the single purpose of proving, so far as it tended to do so, the intent with which the defendant originally took the property into his possession at the time of finding it. And the bill of exceptions does not state what the acts and declarations admitted in evidence were, and consequently does not show that any of them had no tendency to prove that intent, nor indeed that any acts were proved except such as accompanied and gave significance to distinct admissions of the intent with which the defendant originally took the goods.

Exceptions overruled.

State *v.* Ferguson, 2 McMull, 502; Randall *v.* The State, 1 Morris' St. Cases, 254; People *v.* Swan, 1 Parker C. C. 9; Lane *v.* People, 10 Ill. 305; State *v.* Cummings, 33 Conn. 260.

ABANDONED PROPERTY.

Property abandoned by the owner returns to the common stock of unowned things, and the title thereto thereafter vests in him who first occupies it.

HESLEM *v.* LOCKWOOD.

Supreme Judicial Court of Connecticut, 1871.

37 Conn. 500.

PARK, J. We think the manure scattered upon the ground, under the circumstances of this case, was personal property. The cases referred to by the defendant to show that it was real estate are not in point. The principle of those cases is that manure made in the usual course of husbandry upon a farm is so attached to and connected with the realty that, in the absence of any express stipulation to the contrary, it becomes appurtenant to it. The principle was established for the benefit of agriculture. It found its origin in the fact that it is essential to the successful cultivation of a farm that the manure produced from the droppings of cattle and swine fed upon the products of the farm, and composted with earth and vegetable matter taken from the land, should be used to supply the drain made upon the soil in the production of crops, which otherwise would become impoverished and barren; and in the fact that manure so produced is generally regarded by farmers in this country as a part of the realty, and has been so treated by landlords and tenants from time immemorial: Daniels *v.* Pond, 21 Pick. 367; Lewis *v.* Lyman, 22 Id. 437; Kittredge *v.* Woods, 3 N. Hamp. 503; Lassell *v.* Reed, 6 Greenl. 222; Parsons *v.* Camp, 11 Conn. 525; Fay *v.* Muzzy, 13 Gray, 53; Goodrich *v.* Jones, 2 Hill, 142; 1 Washb. on Real Prop. 5, 6.

But this principle does not apply to the droppings of animals driven by travellers upon the highway. The highway is not used, and cannot be used, for the purpose of agriculture.

The manure is of no benefit whatsoever to it, but, on the contrary, is a detriment; and in cities and large villages it becomes a nuisance, and is removed by public officers at public expense. The finding in this case is "that the removal of the manure and scrapings was calculated to improve the appearance and health of the borough." It is, therefore, evident that the cases relied upon by the defendant have no application to the case.

But it is said that if the manure was personal property, it was in the possession of the owner of the fee, and the scraping it into heaps by the plaintiff did not change the possession, but it continued as before, and that, therefore, the plaintiff cannot recover, for he neither had the possession nor the right to the immediate possession.

The manure originally belonged to the travellers whose animals dropped it, but it being worthless to them, was immediately abandoned; and whether it then became the property of the borough of Stamford which owned the fee of the land on which the manure lay, it is unnecessary to determine; for if it did, the case finds that the removal of the filth would be an improvement to the borough, and no objection was made by any one to the use that the plaintiff attempted to make of it. Considering the character of such accumulations upon highways in cities and villages, and the light in which they are everywhere regarded in closely settled communities, we cannot believe that the borough in this instance would have had any objection to the act of the plaintiff in removing a nuisance that affected the public health and the appearance of the streets. At all events we think the facts of the case show a sufficient right in the plaintiff to the immediate possession of the property as against a mere wrong-doer.

The defendant appears before the Court in no enviable light. He does not pretend that he had a right to the manure, even when scattered upon the highway, superior to that of the plaintiff; but after the plaintiff had changed its original condition and greatly enhanced its value by his labor, he seized and appropriated to his own use the fruits of the plaintiff's outlay, and now seeks immunity from responsibility on the ground that the plaintiff was a wrong-doer as well as himself. The conduct of the defendant is in keeping with his claim, and

neither commends itself to the favorable consideration of the Court. The plaintiff had the peaceable and quiet possession of the property, and we deem this sufficient until the borough of Stamford shall make complaint.

It is further claimed that if the plaintiff had a right to the property by virtue of occupancy, he lost the right when he ceased to retain the actual possession of the manure after scraping it into heaps.

We do not question the general doctrine that where the right by occupancy exists it exists no longer than the party retains the actual possession of the property, or till he appropriates it to his own use by removing it to some other place. If he leaves the property at the place where it was discovered, and does nothing whatsoever to enhance its value or change its nature, his right by occupancy is unquestionably gone. But the question is, if a party finds property comparatively worthless, as the plaintiff found the property in question, owing to its scattered condition upon the highway, and greatly increases its value by his labor and expense, does he lose his right if he leaves it a reasonable time to procure the means to take it away, when such means are necessary for its removal?

Suppose a teamster with a load of grain, while travelling the highway, discovers a rent in one of his bags, and finds that his grain is scattered upon the road for the distance of a mile. He considers the labor of collecting his corn of more value than the property itself, and he therefore abandons it, and pursues his way. A. afterwards finds the grain in this condition and gathers it kernel by kernel into heaps by the side of the road, and leaves it a reasonable time to procure the means necessary for its removal. While he is gone for his bag B. discovers the grain thus conveniently collected in heaps and appropriates it to his own use. Has A. any remedy? If he has not, the law in this instance is open to just reproach. We think under such circumstances A. would have a reasonable time to remove the property, and during such reasonable time his right to it would be protected. If this is so, then the principle applies to the case under consideration.

A reasonable time for the removal of this manure had not

elapsed when the defendant seized and converted it to his own use. The statute regulating the rights of parties in the gathering of sea-weed gives the party who heaps it upon a public beach twenty-four hours in which to remove it, and that length of time for the removal of the property we think would not be unreasonable in most cases like the present one.

We, therefore, advise the Court of Common Pleas to grant a new trial.

2 Schouler, P. P. 9;
McCoon *v.* Ankeny, 11 Ill. 558;
Livermore *v.* White, 74 Me. 455;
Hurt *v.* Hollingworth, 100 U. S. 104;
Sideck *v.* Duran, 67 Tex. 262.

An invention may be abandoned.
Am. & Dressing Mch. Co. *v.* Tool Co., 4 Fisher P. C. 299;
Woodbury Planing Machine Co. *v.* Keith, 101 U. S. 485.

EXCEPTIONS.

Title to waifs, estrays, treasure trove, and wrecks, instead of vesting in the finder, under the English law vested in the king.

HUTHMACHER *v.* HARRIS.

Supreme Court of Pennsylvania, 1861.

38 Pa. St. 491.

WOODWARD, J. The ground on which we affirm this judgment is, that there was no sale of the valuables contained in the block of wood, which is called, in virtue of its horizontal wheel and upright spindle, "a drill machine." Sale, said Mr. Justice Wayne, in Williamson *v.* Berry, 8 How. 544, is a word of precise legal import, both at law and in equity. It means at all times a contract between parties to pass rights of property for money which the buyer pays, or promises to pay, to the seller for the thing bought or sold.

That no such contract was made by these parties in respect to the contents of the drill machine, we deduce from the agreed facts of the case. The machine itself, and every essential part

and constituent element of it, were well sold. The consideration paid, though only fifteen cents, was in law a *quid pro quo*, and the sale, unaffected by fraud or misrepresentation, passed to the purchaser an indefeasible right to the machine and all the uses and purposes to which it could be applied. But the contents of the machine are to be distinguished from its constituent parts. They were unknown to the administrators, were not inventoried, were not exposed to auction, were not sold. Of course, they were not bought. All that was sold was fairly bought, and may be held by the purchaser. The title to what was not sold remains unchanged. A sale of a coat does not give title to the pocketbook which may happen to be temporarily deposited in it, nor the sale of a chest of drawers a title to the deposits therein. In these cases, and many others that are easily imagined, the contents are not essential to the existence or usefulness of the thing contracted for, and, not being within the contemplation or intention of the contracting parties, do not pass by the sale. The contract of sale, like all other contracts, is to be controlled by the clearly ascertained intention of the parties. The argument proceeded very much on the doctrine that equity will in certain cases relieve against mistakes of fact as well as of law; but if there was no contract of sale, there could be no mistake of fact to vitiate it, and therefore that doctrine has no possible application. Mistake is sometimes a ground of relief in equity; but a man who puts up his wares at auction and sells them to the highest bidder, has no right to relief on the ground that he was ignorant of the value of that which he sold. Such a mistake comes of his own negligence, for it is his duty to possess all necessary knowledge of the value of that which he brings to market, and the rule is general that if a party becomes remediless at law by his own negligence, equity will leave him to bear the consequences.

Nor could these administrators, had they sold the contents, have pleaded, in addition to their ignorance, their fiduciary character, and their possible liability for a devastavit, in defeat of the vested rights of the purchaser; for, in respect to the personalty of the decedent, they stood in the dead man's shoes, and were in fact, as they are commonly called in law, his personal representatives. The law cast the personal estate upon

them for purposes of administration, and a fair sale made in pursuit of that purpose would confer as perfect a title as if made by a living owner. They, no more than any other vendor, could not set aside such a sale to avert the consequences of their own negligence.

But, inasmuch as they did not, in point of fact, sell the valuables which are in dispute, these principles, and all the arguments drawn from the law of mistake, are outside of the case.

If, then, there was no sale and purchase of the contents of the block or machine, how did Huthmacher, when he discovered his unsuspected wealth, hold it? Evidently as treasure trove, which, though commonly defined as gold or silver hidden in the ground, may, in our commercial day, be taken to include the paper representatives of gold or silver, especially when they are found hidden with both of these precious metals. And it is not necessary that the hiding should be in the ground, for we are told, in 3 Inst. 132, that it is not "material, whether it be of ancient time hidden in the ground, or in the roof, or walls, or other part of a castle, house, building, ruins, or otherwise."

The certain rule of the common law, in regard to treasure trove, as laid down by Bracton, lib. 3, cap. 3, and as quoted in Viner's Abridgment, is, "that he to whom the property is, shall have treasure trove, and if he dies before it be found, his executors shall have it, for nothing accrues to the king unless where no one knows who hid that treasure." The civil law gave it to the finder, according to the law of nature, and we suppose it was this principle of natural law that was referred to in what was said of treasure trove in a field, in Matthew's Gospel, XIII. 44.

But the common law, which we administer, gave it always to the owner if he could be found, and if he could not be, then to the King, as wrecks, strays, and other goods are given, "whereof no person can claim property:" 3 Inst. 132. Huthmacher, therefore, held the unsold valuables for the personal representatives of the deceased owner.

Several sporadic cases, some of which were highly apocryphal, were mentioned in the argument as affording analogies more or less appropriate to this case, but it is quite unnecessary to

discuss them, because if they touch they do not encumber the clear ground whereon, as above indicated, we rest our judgment.

The judgment is affirmed.

TO SAME POINT.

LIVERMORE *v.* WHITE.

Supreme Judicial Court of Maine, 1883.

74 Me. 452.

APPLETON, C. J.: This is an action of replevin for certain hides of tanned leather. The plaintiff's only title is as finder of them as lost goods. The verdict being against him, exceptions were duly filed to the rulings of the presiding justice, which have been very elaborately and ably argued.

It is in proof that in 1840, Edward Southwick was then owning and carrying on a large tannery, containing seven hundred and eleven vats of which the vats in question were part; that he sold the tannery to Southwick and Weeks who occupied a portion of the vats, not occupying the outside vats; that Edward Southwick died shortly after his conveyance of his estate; that the same passed to the Vassalboro' Manufacturing Company, which erected its mills thereon over twenty years ago; that the defendant is their agent and servant; that while the company were digging to lay a foundation for a brick building in addition to their present erection, the plaintiff, a servant in their employ, discovered the vats and the leather therein, by virtue of which discovery he claims title thereto.

It further appeared that these hides were identified as hides placed in the vats by Edward Southwick, and omitted to be taken when his vats were emptied.

(I.) Upon the question of abandonment the jury were instructed that if they should "find that the owners, for any reason satisfactory to themselves (at that time) intentionally abandoned these hides, expecting that the first finder, the first

explorer or excavator should take possession and enjoy the property and the benefit . . with an intention of the owner or agent not to resume possession, and not to claim any control or dominion over them thereafter, finally relinquishing all interest in them . . then these finders, under the rules given, would have a right to the possession as against all persons whatsoever,"—but if they should find that Edward Southwick, or his agent, or . . . "any owner, whoever he may have been, of these hides, intentionally, carefully, voluntarily and in the ordinary course of business placed them there as his property, and they were accidentally or inadvertently overlooked and forgotten, they remained the property of such owner or the heirs of such owner or of his estate to the present time."

The instruction is correct. Abandonment includes both the intention to abandon and the external act by which the intention is carried into effect. Here the act was one of preservation—the proprietor expending labor upon his property thereby to enhance its value. It was an act which excludes the very idea of abandonment.

In McLaughlin *v.* White, 2 Wendell, p. 405, Chancellor Walworth says: "If chattels are found secreted in the earth or elsewhere, the common law presumes the owner placed them there for safety, intending to reclaim them. If the owner cannot be found, he is presumed to be dead, and that the secret died with him. In such cases, the property belongs to the sovereign of the country as the heir to him who was the owner; but if they are found upon the surface of the earth or in the sea, and if no owner appears to claim them, it is presumed they have been intentionally abandoned by the former proprietor, and as such they are returned into the common mass of things, as in a state of nature."

They consequently belong to the finder or first occupant, who thinks fit to appropriate them to his own use; 1 Bl. Com. 308; 2 Id. 402. Here there was no secreting of the hides; no intentional abandonment, and the estate to which the property belongs is known. The only title of the plaintiff is by finding, but under the circumstances he acquires no right to the property.

The civil law recognizes the title by finding, by occupation,

which gives property in a thing which previously had no proprietor. *Quod enim ante nullius est, id naturali ratione occupanti conceditur.* Inst. 2, 1, 12. If a thing already had an owner, it is only by dereliction by him that it can be appropriated by occupation. Dereliction or renunciation properly requires both the intention to abandon and external action. Thus the casting overboard of articles in a tempest to lighten the ship is not dereliction, as there is no intention of abandoning the property in the case of salvage. Inst. 2, 1, 48. Nor does the mere intention of abandonment constitute dereliction of property without a throwing away or removal, or some other external acts, and herein dereliction of property differs from dereliction of possession, which does not require the second element. "There is this difference between dominion and possession,—that dominion continues after the will to own has ceased, whereas possession ceases with the will to possess:" Poste's Gains, 170.

By Hadrian's law, when treasure was found by any one on his own land, it became his property, but if found accidentally on the land of another, one-half belongs to the finder, and the other half to the owner of the land. This rule is adopted in the French code. Code Civil Act, 713; MacKenzie's Roman Law, 170.

(II.) Nor can this be deemed treasure trove, which is thus defined in Jacob's Dictionary. It is "where any money is found hid in the earth, but not lying upon the ground, and no man knows to whom it belongs." Nothing is treasure trove but gold or silver. "It is not treasure trove if the owner can be known. Nor though the owner be dead; for his executors or administrators shall have it:" Com. Dig. Art. Warp. G. All the elements constituting treasure trove are wanting. Here was no hiding. Here was no secrecy. The owner was known. The deposit was not for concealment, but in the usual and ordinary mode of business.

(III.) This is not a case of lost goods. The owner is shown. They belong to his estate. The title of the finders vanishes when the owner is known. These goods were not lost. The facts negative a loss by the owner. The hides were through carelessness left in the vat. If the fact of their being

there was forgotten by the owner, they are none the less his,—and though forgotten they are not lost. They remain in the vats subject to his control.

In McAvoy *v.* Medina, 11 Allen, 548, it was held that placing a pocket-book voluntarily by a customer upon a table in a shop, and accidentally leaving it there or forgetting to take it, is not to lose it within the sense in which the authorities speak of lost property. "To discover an article voluntarily laid down by the owner in a banking room and upon a desk provided for such persons having business there, is not the finding of a lost article," remarks Wells, J., in Kincaid *v.* Eaton, 98 Mass. 139. "Property is not lost in the sense of the rule," observes Trunkey, J., in Hamaker *v.* Blanchard, 90 Penn. 577, "if it was intentionally laid on the table, counter, or other place by the owner, who forgot to take it away, and in such case the proprietor of the premises is entitled to retain the custody." "The loss of goods," the Court say, in Lawrence *v.* State, 1 Humphrey, 228, "in legal and common intendment, depends on something more than the knowledge or ignorance, the memory or want of memory of the owner as to their locality at any given moment. . . . To lose is not to place anything carefully and voluntarily in the place you intend and then forget it; it is casually and involuntarily to part from the possession; and the thing is then usually found in a place or under circumstances to prove to the finder the owner's will was not employed in placing it there."

The instructions upon the controverted questions were correct. Hides in a vat for the purpose of tanning, though not removed when the other vats are cleared, are not to be deemed abandoned or derelict,—nor though remaining in the vats for a long period through the forgetfulness of their owner or the ignorance of his representative, are they to be considered lost, so that the finder thereby acquires a title to them. Nor can the finding be deemed treasure trove, for there was no gold or silver hidden, and no hiding.

Exceptions overruled.

1 Blackstone, 295; 2 Schouler, P. P. § 10.

TO SAME POINT.

WRECKS.

HAMILTON & SMITH *v.* DAVIS.

Court of King's Bench, 1771.

5 Burr. 2732.

LORD MANSFIELD. There is no sort of doubt concerning the true ownership of these goods, which were cast away in a storm, and recently pursued. Everybody else restored to the true owner the proportions that they had got of them upon a proper salvage offered; this defendant refused to deliver the share that he had got, being forfeited according to his apprehension as a wreck, because no live animal came ashore. He likewise objects to the plaintiff's recovering because certain forms, which he says were requisite to be performed, have not, as he alleges, been properly performed.

The first question is, "Whether these goods are forfeited."

Now, no case is produced, either at common law, or on the construction of the statute E. I., c. 4, to prove that the goods were forfeited, because no dog or cat or other animal came alive to shore. I will therefore presume that there never was any such determination; and that no case could have been determined so contrary to the principles of law, justice, and humanity. The very idea of it is shocking. And there is no ground for such a forfeiture, upon the distinction that has been so much urged, between a man or other animal coming to shore alive, or not alive. The coming to shore of a dog or a cat alive can be no better proof than if they should come ashore dead; the escaping alive makes no sort of difference. If the owner of the dog or cat or other animal was known, the presumption of the goods belonging to the same person would be equally strong, whether the animal was alive or dead. If no owner could be discovered, the goods belonged to the king. But there ought to be a reasonable time allowed to the owner to come in and claim them; and it was proper that the time should be

limited. The old limitation was a year and a day; which was the time limited in many other cases. See 7 Co. 107, b. 108, a. The mode of proof was as it might happen. Goods are now, generally, marked; perhaps in ancient days it might not be so common, or so accurate; and then a dog or cat might be a presumption towards the ascertaining the owner of the goods. Bracton, who wrote in the time of H. 3, says (Lib. 3, c. 3, pa. 220, a): "Magis propriè dici poterit wreccum, fi navis frangatur, &c. nisi ita sit, quod verus dominus aliunde veniens, *per certa indicia et signa* docuerit res esse suas; ut si canis vivus inveniatur, &c. et eodem modo, si *certa signa* apposita fuerint mercicibus et alijs rebus." And Bracton's opinion has been recognized by later writers. Lord Coke, in his first report, 107, says (see also 2 Inst. 166) that it appears from Bracton that the statute of W. I. was but a declaration of the common law; and cites the same passage from Bracton: "Et quòd hujusmodi dici debet wreccum, verum est, nisi sit quód verus dominus aliunde veniens, *certa indicia est signa* donaverit res esse suas; ut si canis vivus inveniatur, et constare poterit quod talis sit dominus illius canis; presumptivè ex hoc, illum esse dominum illius canis et illarum rerum; eodem modo, si *certa signa* imposita fuerint *mercibus.*" Thus it stands at the common law. Then, has the statute of 3 E. I., c. 4, altered the common law? No; quite otherwise. And this Act was made in favor of the owner. It enacts (negatively) "That it shall not be wreck, if man, dog, or cat escape alive;" but it has no contrary (positive) provision, "That if neither man, dog, or cat, &c., escape alive, it shall belong to the king." This statute has been recognized as declaratory of the common law. The words of it are— "Concerning wreck of the sea, it is agreed that where a man, a dog, or a cat escape quick out of the ship, that such ship, nor barge, nor any thing within them shall be adjudged wreck but the goods shall be saved and kept, &c., so that if any sue for those goods, and after prove that they were his or perished in his keeping, within a year and a day, they shall be restored to him without delay; and if not, they shall remain to the king." Lord Coke says that "These three instances (of a man, dog, or cat) are put but for examples; for, besides these two kinds of beasts, all other beasts, fowls, birds, hawks, and other

living things are understood, whereby the ownership or property of the goods may be known:" 2 Inst. 167, 168. And this is agreeable to the charter of king Henry the 2d, which includes every animal whatsoever. And this escape of a dog or cat or other animal is considered as a medium of proof, whereby the ownership or property of the goods may be known: 2 Inst. 168. If this was a recent statute, it ought to be construed according to reason and justice. For the Court ought not, unless they are absolutely obliged to it, to construe an Act of Parliament directly contrary to the plain and clear principles of justice and humanity, which the construction urged on the part of the defendant in this case would undoubtedly be in the highest degree. But this is a statute of very ancient standing; and was declaratory of the common law (as appears from Bracton, who wrote before the making of it); and has been since sufficiently recognized; and no case produced to the contrary, nor any authority in point. The other two statutes are out of the case: they do not relate to this matter. Besides, here the defendant has insisted upon property. I am very clear, that the direction was right; and that the rule for a new trial ought to be discharged.

The rule to show cause why there should not be a new trial was discharged.

Peabody *v.* Twenty-eight Bags of Cotton, 2 Am. Jur. 119;
Baker *v.* Bates, 13 Pick. 255;
The Schooner Tilton, 5 Mason, 465.

EMBLEMENTS.

Title to emblements is also acquired by original occupancy.

REILEY *v.* RINGLAND.

Supreme Court of Iowa, 1874.

39 Iowa, 106.

MILLER, C. J. The record shows that William B. Wells, on the 30th of September, 1868, commenced an action in the District Court of Webster County against Hannah Reilly to set aside her patent to certain lands; that that action was removed to the Circuit Court of the United States, in which a trial was had and a judgment rendered at the October Term, 1869, in favor of said Wells, declaring him the true owner of the land and annulling the patent of Mrs. Reilly, which judgment was afterwards affirmed in the Supreme Court of the United States. On the 4th day of November, 1870, Mrs. Reilly filed her petition in the Circuit Court of the United States under the occupying claimant law, and at the May Term, 1871, of said Court she recovered a judgment against Wells for $2,353.39. In October, 1868, for a valuable consideration, Hannah Reilly conveyed to the plaintiff, her son, a portion of the land embraced in her patent, which was subsequently annulled. The plaintiff continued in the actual occupancy of the land conveyed to him until ejected therefrom by process of law. He was not made a party to the action against Hannah Reilly. By the terms of the judgment in favor of Mrs. Reilly against Wells it was provided, among other things, that Wells should take no proceedings for the enforcement of his decree against Mrs. Reilly until the payment of the judgment rendered in her favor for the improvements made on the land by her, and that, in case of a failure to pay the same within three years, said Hannah Reilly should be entitled to hold the land free from the claim of Wells upon the payment of $3500 within one year thereafter.

In July, 1871, Wells paid the judgment against him, and, on the 15th of the same month, sued out from the Circuit Court of the United States a writ of assistance, by virtue of which Hannah Reilly and the plaintiff were removed from the lands in question, and the grain mentioned in plaintiff's petition was taken possession of by the defendants. The plaintiff thereupon brought this action to recover back said grain.

The Court instructed the jury "that under the possession given by the Marshal in the service of the writ of assistance introduced in evidence in this case, the defendant, Wells, was entitled to the possession of the property in controversy in this case at the time of the commencement of this suit, and they will render a verdict accordingly, and will find the value of the property at the amount named in the petition, to-wit: two hundred and five dollars."

The first question involved in the instruction is, whether the writ of assistance under which Wells obtained possession of the land entitled him to the crops which were then upon the land, and had been raised by the plaintiff.

It is a broad and almost universal principle that the tenant who sows a crop shall reap it, if the term of his tenancy be uncertain: 1 Washburn on Real Property, 102, 106; 2 Blackstone's Com. 122; Stewart *v.* Doughty, 9 Johns. 108; Williams on Executors, 597. In order to entitle a tenant or his executor or administrator to emblements, his tenancy must be uncertain in its duration: Debow *v.* Colfax, 5 Halst. 128; Kittredge *v.* Wood, 3 N. H. 503; Whitmarsh *v.* Cutting, 10 Johns. 360; Chesley *v.* Welch, 37 Me. 106; Harris *v.* Carson, 7 Leigh. In the next place the tenancy must be determined by the act of God, as by the death of the tenant, or by the act of the lessor or owner in expelling the tenant or terminating his tenancy: Ibid.

One of the important rights of a tenant for life is this right to emblements, or profits of the crop which the law gives him, or to his executors if he be dead, to compensate for the labor and expense of tilling and sowing the land. See Williams on Executors, 597. The same principles apply also to tenancies at will: Davis *v.* Thompson, 13 Me. 209; Davis *v.* Brocklebank, 9 N. H. 73; Sherburne *v.* Jones, 20 Me. 70; Stewart

v. Doughty, 9 Johns. 108; Chandler *v.* Thurston, 10 Pick. 205.

A tenant having the right to the emblements has the corresponding right also to enter upon the premises to harvest the crops growing at the termination of his tenancy: Forsythe *v.* Price, 8 Watts, 282; Humphries *v.* Humphries, 3 Iredell, 362; Coke on Lit. 56, *a.*

By statute, in this State, "any person in the possession of real property with the assent of the owner, is presumed to be a tenant at will, unless the contrary is shown:" Revision, § 2216; Code, § 2014.

Under the law in regard to the rights of occupying claimants, and by the terms of the judgment in the Circuit Court of the United States (Rev. Ch. 97), the plaintiff was entitled to the possession of the land until Wells should pay off that judgment, which he could have done at once, or he might do so at any time within three years. He did not choose to pay off the judgment at the time of its rendition, but delayed such payment for about two months. By so doing he assented to the plaintiff remaining in possession during such delay. Plaintiff's possession was, therefore, with the assent of the owner. The duration of his tenancy was rendered uncertain by the defendant, and was determined by his act alone.

The case, therefore, is brought within the rule under which the tenant is entitled to the growing crops.

The defendant was allowed, by the law and the judgment of the Court, to pay off the judgment for the improvements at any time within three years. Plaintiff was entitled to the possession in the meantime. The defendant might take the whole three years to make payment if he saw fit to do so. The law would be a mockery if the plaintiff, under such circumstances, would not be allowed to cultivate the land of which he was in the rightful possession, or, after having raised a crop thereon, the defendant should be permitted to take it away from him. When the statute gives the possession of land to an occupying claimant, as in this case, for three years, unless the owner shall sooner pay for the improvements, it does not mean that he shall have none of the fruits or benefits of such possession. It does not intend that the land shall lie idle and uncultivated

during this time, nor that the owner shall reap all of the results of the cultivation thereof by the occupying claimant during the time he is in the lawful possession thereof.

We have examined the cases cited by appellees' counsel, and find that but one of them sustains their theory of the case, namely: Strode *v.* Swim, 1 A. K. Marshall, 271, which holds that the successful claimant, electing to pay for improvements under the occupying claimant law, is entitled to the crop growing on the premises when possession is taken. We have not seen the statute under which this decision was made. It may not have contained provisions giving time in which the successful claimant has the right to elect whether he will pay for the improvements or not, as our statute does, thereby creating a tenancy at will. Our statute on this subject did not originally, as enacted in the Code of 1851, contain this provision, but, on the contrary, it contemplated an immediate election to pay or not at the time of the rendition of the judgment: Revision, § 2267; Code of 1851, § 1236. By Chap. 153, Laws of 1858, this provision was enacted as an amendment of Chap. 80 of the Code of 1851. The difference in the conclusions reached by the two Courts may very well result from differences in the two statutes.

In Lane *v.* King, 8 Wend. 584, cited by appellees' counsel, it was held that a lessee of the mortgagor, under a lease executed subsequent to the mortgage, is not entitled, as against the mortgagee, to crops growing on the mortgaged premises at the time of the foreclosure and sale of the same; and the mortgagee, becoming the purchaser, may maintain trespass against the lessee for taking and carrying away the crops.

The doctrine upon which this decision is based is that at that time in New York the mortgagee was the owner of the land; that a purchaser of the interest of the mortgagor, or a lessee under him, acquired no rights as against the mortgagee, that he was a mere trespasser: 4 Johns. R. 215; 16 Id. 289; 2 Id. 61.

It was said that the mortgagor, in giving a lease, became a disseizor as to the mortgagee. The Court regarded the lessee as a trespasser and not entitled to notice to quit. In this case the occupying claimant was lawfully in possession, and, as we

have seen, to all intents and purposes, a tenant at will. The distinction in the cases is radical and plain.

The case of Ralston *v.* Ralston, 3 G. Greene, 533, holds that a crop of wheat growing upon the land at the time it was set off and confirmed to the widow as dower, will pass with the land and be considered as a part of her estate unless reserved. This case is not inconsistent with the conclusions we have above stated. We have seen that the rule of the common law is that a tenant for life, and also other tenants of estates of uncertain duration, are entitled to emblements. There was an exception, however, to this rule in respect to emblements in case of a dowress, because it was presumed that when her husband died she took the estate with the crops upon it: Coke 2d Inst. 80. The case in 3 Bing. 11, does not bear on the question before us. The instruction was erroneous to the prejudice of the plaintiff.

II. On the trial, plaintiff proposed to prove that the value of the grain replevied was not so great as stated in the petition; that, at the time of swearing to the petition, he supposed the grain to be in the same condition that it was when taken from him—in good marketable condition—and on that basis estimated its value; that he afterwards discovered that the grain had been badly stacked by the defendants, whereby it was seriously damaged and rendered of little value, etc.

The defendant objected to this evidence on the ground that plaintiff was bound by the statement of the value of the grain sworn to in his petition, which objection the Court sustained. This ruling is assigned as error. There is nothing here upon which to base an estoppel as to the value of the grain. Our statute provides that a failure to deny an allegation of value in a pleading does not amount to an admission of its truth: Revision, § 2717. Under our system of pleading and practice, the question of value is one to be determined by proof. A party failing to deny an allegation of value is not estopped from offering evidence, nor should a party be precluded from proving the true value where, by mistake, he has alleged it incorrectly, or where the value may have changed since the allegation was made. This question is open for proof on both sides. The defendant has not taken any action, or been misled

in any manner by the allegations as to the value of the grain replevied. The evidence was improperly rejected.

The judgment will be reversed.

DARLINGTON, P. P. 28; 2 Blackstone, 403; Panhallow *v.* Dwight, 7 Mass. 34; Whipple *v.* Foot, 2 Johns. 418; Hartwell *v.* Bissell, 17 Johns. 128; G. S. Minn. 1878, p. 758, § 315.

TITLE BY ACCESSION.

"The doctrine of property arising from accession is also grounded on the right of occupancy:" 2 Blackstone, 404.

I.

The title to fruit growing upon vines, bushes, trees, etc., vests in their owner.

FREEMAN *v.* UNDERWOOD.

Supreme Judicial Court of Maine, 1877.

66 Me. 233.

PETERS, J. A question raised by the defendants is, whether the demand made upon them by the plaintiff for the berries was sufficient. The answer is, that no demand was necessary. The persons who picked the berries from the land in plaintiff's possession were trespassers. They sold the berries to the defendants. The defendants received them at their factory for the purpose of "canning" them, as it is termed. The berries were of a rapidly decaying character, requiring immediate use, undoubtedly received from time to time, and it would have been quite impracticable to redeliver the property to the plaintiff, had he duly demanded the same. But the defendants, by their purchase and possession of the berries, although acting in good faith and in ignorance of the want of title in their vendors, assumed thereby an ownership and exercised a dominion over the property which rendered them liable in trover to the true owner without any demand therefor. The following are some of the cases directly pertinent to this point: Galvin *v.* Bacon, 11 Maine, 28; Porter *v.* Foster, 20 Maine, 391; Hotchkiss *v.* Hunt, 49 Maine, 224; Stanley *v.* Gaylord, 1 Cush. 536; Riley *v.* Boston Water Power Co., 11 Cush. 11; Gilmore *v.* Newton, 9 Allan, 171; Bearce *v.* Bowker, 115 Mass. 129.

The defendants also deny that the writing to the plaintiff

from his wife conferred any right of action upon him, so that he could sue for the berries in his own name. But we think it clear that the writing amounts to an executory sale of the blueberries, which would make them his when picked from the bush, or perhaps when merely grown; the writing also combining with the sale a lease of the land, which gave to the plaintiff a sufficient estate for the growing and supporting of the successive annual yields of berries thereon. This transaction was valid between the parties thereto as against all strangers. When the berries were taken from the bush by unauthorized persons they were the property of the plaintiff. As to this point, see the following authorities: Cutler *v.* Pope, 13 Maine, 377; Trull *v.* Fuller, 28 Maine, 545; Farrar *v.* Smith, 64 Maine, 74; Stearns *v.* Washburn, 7 Gray, 187; Douglas *v.* Shumway, 13 Gray, 498; Claflin *v.* Carpenter, 4 Met. 580; Lamson *v.* Patch, 5 Allen, 586; Drake *v.* Wells, 11 Allen, 141. See also Wash. Real Prop., vol. 1, book 1, c. 1, on the nature and classification of real property.

Exceptions overruled.

DARLINGTON, P. P. 28; Waterman *v.* Soper, 1 Ld. Ry. 737; Masters *v.* Pollie, 2 Roll. 141; Griffin *v.* Bixbis, 12 N. H. 454; Gale *v.* Sheely, 15 Vt. 121; Higgins *v.* Custerer, 41 Mich. 318; Freeman *v.* McLanan, 26 Kas. 151; Adams *v.* Smith, 1 Ill. 258, note; Lyman *v.* Hale, 11 Conn. 177; Dubois *v.* Beaner, 25 N. Y. 123; Hoffman *v.* Armstrong, 46 Barb. 337; 4 Pick. 410; 1 Metc. 127.

II.

Title to the brood of all tame and domestic animals vests in the owner of the dam.

KELLOGG *v.* LOVELY.

Supreme Court of Michigan, 1878.

46 Mich. 131.

GRAVES, J. The circumstances of this controversy are as follows: In October, 1878, the defendant (Lovely) sold the

plaintiff (Kellogg) on credit a mare, buggy, and harness for the agreed price of $250, and the plaintiff gave his note, together with a mortgage on the property, for the entire sum.

The mare was with foal, and about the first of June following she dropped the colt. On the first of July the mortgage became due, and Kellogg failing to pay, Lovely proceeded to take the property. There was no dispute about his right to take the mare, buggy, and harness, but the parties appear to have differed about the colt. Lovely maintained that the mortgage applied to it, and gave him the same right to the colt that it did to the mare, but Kellogg contested this claim and contended that the colt being the offspring of the mare was his property, and not having been born when the mare was purchased and the mortgage given was not subject to the mortgage.

The colt had not been weaned and was running with the mare, and when Lovely drove her off the colt followed. Lovely soon afterwards proceeded to sell the whole property, the colt included, under the mortgage, and we gather from the case that it was bought in by him through an agent. The whole sum for which the property was struck off was $176, and shortly afterwards Kellogg paid the remainder of the debt. He then instituted replevin against Lovely, before a justice of the peace, to obtain the colt, and it was seized on the writ and delivered into his possession. The justice entered a nonsuit against him, and Lovely waiving return of the colt, the value was assessed at $55, for which Lovely took judgment. An appeal was made, and the Circuit Court reduced the assessment to $30, and awarded Kellogg $78 costs, and extinguished the former by applying an equal amount of the latter by way of set-off. Thereupon Kellogg sold the colt and brought this action of trespass, counting on the transaction when Lovely took the mare on the mortgage. The justice gave judgment in Kellogg's favor for the value of the colt, and Lovely appealed. The circuit Judge ruled that there was no evidence of trespass and ordered a verdict for Lovely. It is not certain that the circuit Judge was correct in the reason on which he proceeded. But whether he was so or not is unimportant unless the result was wrong.

The fundamental question in the case relates to the effect on

the legal ownership of the colt, of the sale of the mare to Kellogg and the mortgage back.

In respect to tame and domestic animals, the general rule is well understood, that "the brood belongs to the owner of the dam or mother" (2 Bl. Com. 390), but there are many cases in which the rule is qualified in its application. It has been held, and may be true in special cases, that where the female is hired for a time limited, and has increased during the term, the hirer will be entitled to it and not the general owner: 2 Kent. 361; Edwards on Bailments, § 403; Putnam *v.* Wyley, 8 Johns. 432; Concklin *v.* Havens, 12 Johns. 314; Hanson *v.* Millett, 55 Me. 184; Stewart *v.* Ball, 33 Mo. 154. And so, too, it was decided in Linnendoll *v.* Terhune, that a foal obtained under an agreement, by which the owner of the mare arranged with another person, that if he would put her to horse and pay the expense he should have the foal, became the property of such persons: 4 Johns. 222.

It is also laid down by Judge STORY that where a thing is pledged its natural increase as accessory is also pledged, and he gives by way of illustration the case where a flock of sheep are pledged, and observes that the young afterwards born are also pledged: Bailments, § 292; and see Domat, part 1, book 3, tit. 1, § 1, art. 7; Kaufm. Mackeldey, book 1, § 267. In Iowa and Kentucky, and probably in other States, it has been decided that the young of animals under mortgage are subject to the mortgage (Forman *v.* Proctor, 9 B. Mon. 124; Thorpe *v.* Cowles, 55 Iowa, 408); and no cases to the contrary have been discovered. Perhaps these last decisions may have originated in the doctrine that the mortgagee of chattels is the legal owner; and the Courts may have considered that in holding the young of mortgaged animals to be subject to the mortgage, they were only applying the general rule which assigns the increase to the owner of the mother. But it is useless to speculate on the subject.

The case before the Court belongs to a peculiar and exceptional class, and it may be disposed of without bringing into question the general doctrine. As previously stated, the mare was carrying her colt when Lovely sold her, and the plaintiff not paying anything whatever, gave back at the same moment

a chattel mortgage for the entire price. There was no interval of time between the sale and mortgage. Each took effect at the same instant. The whole was substantially one transaction. Now it is a rule of natural justice that one who has gotten the property of another ought not, as between them, to be allowed to keep any part of its present natural incidents or accessories without payment, and that the party entitled should have the right to regard the whole as being subject to his claim. The one ought not to suffer loss, nor the other effect a gain, through a mere shuffle, and whatever fairly belongs to the thing in question, as the young the dam is carrying belongs to her, ought to be as fully bound as the thing itself, unless, indeed, there are circumstances which imply a different intention.

It is not unreasonable to construe the acts of these parties by these principles, and to consider that when Lovely sold the mare without receiving anything down, and Kellogg gave back the mortgage for the whole purchase price to be due before the colt, according to the ordinary course of things, would be old enough to be separated from the mare, it operated as well to hold the colt as to hold the mare herself. The intendment is a fair and just one, that the security was to be so far beneficial to Lovely as to preserve to him the right to claim at the maturity of the mortgage the same property he would have had in case he had made no sale. According to this view, there was the same right to the colt as to the mare, and the act of seizure sued for was not a trespass. The result ordered by the circuit Judge was therefore correct, and the judgment must be affirmed with costs.

Hansen *v.* Millett, 55 Me. 184;
Stewart *v.* Bull, 33 Mo. 154;
Hazelbaker *v.* Goodfellow, 64 Ill. 238;
Lyson *v.* Simpson, 2 Hayw. 147;
Buckmaster *v.* Smith, 22 Vt. 203;
Elmore *v.* Fitzpatrick, 56 Ala. 400.

Except in case of cygnets.
Case of Swans, 7 Coke, 17.

Where one lets the dam, the young born during the time belong to the one hiring the animal.
Putman *v.* Wylie, 8 John. 432.

The sale of the dam carries with it the title to her further offspring.
Buckmaster *v.* Smith, 22 Vt. 203;
Hull *v.* Hull, 48 Conn. 250;
Elmore *v.* Fitzpatrick, 56 Ala. 400.

III.

If the materials of one person are united to the materials of another by labor, forming a joint product, the owner of the principal material will acquire title to the whole by accession.

PULCIFER *v.* PAGE.

Supreme Judicial Court of Maine, 1851.

32 Me. 404.

If materials belonging to several persons are united by labor into one article, the person owning the principal part of the material will acquire title to all.

A. and B. each had a chain. Each chain had been broken into several pieces. B. took all the pieces to a blacksmith, without the knowledge or consent of A., and had the pieces made into two chains. B. afterwards took one of the chains, composed of a large part of his own and a small part of A.'s, and the trial Court held the title of this chain to be in B.

HOWARD, J. This case presents a question of acquisition of property by accession, but does not involve an inquiry concerning the admixture or confusion of goods. It is a general rule of law, that if the materials of one person are united to the materials of another by labor, forming a joint product, the owner of the principal materials will acquire the right of property in the whole by right of accession. This was a rule of the Roman, and of the English law, and has been adopted, as it is understood, in the United States, generally: Dig. 6, 1, 61; Bracton *de acq. rerum dom.* B. 2, c. 2, § 3, 4; Molloy, B. 2, c. 1, § 7; Pothier, *Trait du droit de propriete*, L. 1, c. 2, art. 3, No. 169–180; 2 Black. Com. 404; 1 Bro. Civil Law, 241; Glover *v.* Austin, 6 Pick. 209; Sumner *v.* Hamlet, 12 Pick, 83; Merritt *v.* Johnson, 7 Johns. 474; 2 Kent's Com. 361.

The distinctions and qualifications that may be appropriate and necessary in the application of this doctrine to a variety of cases that may arise, do not require consideration in determining this case. The first instruction stated was favorable to

the defendant, and forms no ground of exceptions for him; and the plaintiff does not complain of it. The second instruction, that "if the plaintiff had only incorporated into this chain some small portion of the defendant's chain, without his consent, not exceeding two or three links, the chain would not by the incorporation of such small portion become the property of the defendant," is understood to be in accordance with the rule of law before mentioned, and is not erroneous.

Exceptions overruled, judgment on the verdict.

2 Blackstone, 404;
2 Kent, 361;
Glover *v.* Austin, 6 Pick. 209;
Sumner *v.* Hamlet, 12 Pick. 76;
Merritt *v.* Johnson, 17 John. 474;
Johnson *v.* Hunt, 11 Wend. 136.

TO SAME POINT.

Where property capable of being mixed with other like property, as wheat, is delivered to a manufacturer to be manufactured into other forms, as wheat into flour, the transaction is generally regarded as a bailment, and the title remains all the while in the bailor.

FOSTER *v.* PETTIBONE.

Court of Appeals of New York, 1852.

7 New York Ct. of App. 433.

RUGGLES, C. J.: This controversy arises upon a contract in relation to wheat between a merchant and miller; and it is one of the many cases concerning the same subject-matter in which it is somewhat difficult to determine whether the parties intended to make a contract of sale or of bailment.

The distinction between a bailment and a sale is correctly laid down by BRONSON, C. J., in Mallory *v.* Willis, 4 Comst. 85, in these words: "When the identical thing delivered, although in an altered form, is to be restored, the contract is one of bailment and the title to the property is not changed;

but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed: it is a sale."

The Judges in that case differed with respect to the effect of the distinction upon the case before them, but not in regard to the distinction itself.

We will examine the contract in detail. In October, 1844, Brown agreed to deliver to Foster, at Rochester, 30,000 bushels of wheat to be ground. These words, unless qualified and controlled by some subsequent part of the agreement, show a bailment for manufacture and not a sale. They show what was to be done with the wheat. If the contract operated as a sale, Foster might lawfully sell it again and immediately. But it was to be ground and not sold; and the words used by the parties control the power of Foster over the wheat and prevent him from selling it as his own property.

The contract proceeds: "Fifteen thousand bushels to be ground in season to be shipped east during the navigation this fall." What was to be shipped east? The only answer to be given to this question consistent with the language of the parties is, that it was the flour to be made of this 15,000 bushels of wheat. And if this part of the contract is obligatory on Foster, he was bound to return that identical flour for the purpose specified.

Why was the time fixed within which it was to be manufactured? If the transaction was a sale, the time was immaterial, because Foster might have delivered other flour without having ground the wheat within the time; but if it was a bailment, the time was material, and the parties deemed it material, or they would not have fixed it by a stipulation in the contract. They contemplated a bailment therefore and not a sale.

The contract goes on thus: "And fifteen thousand to be ground during the winter." The same observations apply to this clause. Both these provisions are obligatory upon Foster; they bind him to grind the wheat within the specified times; and this was to be done for the benefit of Brown. But Brown could derive no benefit from the manufacture within the time, except to enable Foster to return him the flour to be made from

the wheat; and if that was what the parties meant should be done, they intended a bailment and not a sale.

The next provision in the contract is this: "Said Brown to be subject to no charge on account of storage." If the parties had intended a sale, this clause was useless and senseless; because Foster could have no pretence for charging for the storage of his own wheat. But if they intended a bailment this provision was useful, effective, and sensible. It secured Brown against a charge which Foster would otherwise have had a right to make. It is a legal maxim that any part of an instrument shall, if possible, be construed as having some effect. If we apply this maxim to the contract in question, we must regard the transaction as a bailment and not a sale.

There was this further provision in the contract: "The wheat to be received from Gelston & Evans, and the flour to be returned to them." The import of this sentence is that the wheat received from Gelston & Evans should go back to them again in flour. The delivery to them of the flour of the same wheat would be a return of the same thing in a different form. The delivery of the flour of other wheat would not be a return to Gelston & Evans, because it had never been in any form in their hands.

Every sentence in the contract has now been noticed excepting one, and every sentence thus noticed contains evidence that the parties intended a bailment and not a sale.

The part not yet noticed stands in the contract immediately after the clause in relation to storage; it is in these words: "Said Foster is to deliver to said Brown one barrel of superfine flour for each five bushels of wheat so delivered to be ground."

It is contended that Foster is not bound by this stipulation to return Brown or his agents the flour of the same wheat, but may perform his contract by the delivery of any other superfine flour, and therefore the transaction was a sale and not a bailment.

If the particular clause under consideration were to be considered and construed by itself, and without reference to any other part of the contract, we should assent to the plaintiff's proposition; and according to the rule by which a sale is distinguished from a bailment we should regard it as a sale,

because Foster is not expressly and in terms bound in this clause to return flour of the same wheat. There are, however, even in this clause, words which make it doubtful whether the parties did not look to a return of that flour. The purpose for which the wheat was delivered, namely, "to be ground," is distinctly expressed in it; and if we are to understand it was to be ground for Brown (and that seems to be a natural and necessary interpretation), the parties must have regarded it as Brown's flour in Foster's hands as bailee. But it is a settled rule in the construction of contracts that the interpretation must be upon the entire instrument and not merely on disjointed or particular parts of it. The whole context is to be considered in collecting the intention of the parties, although the immediate object of inquiry be the meaning of an isolated clause: Chitty on Contr. 83, and authorities cited. Here is a contract every sentence of which excepting one shows an intention to create a bailment and not to make a sale. Even that one standing alone is ambiguous. It shows expressly that the wheat was delivered to be ground, and by implication that it was to be ground for Brown. It authorizes performance by a return of the flour made from the wheat received. It is not directly repugnant to the other parts of the contract, because it does not require performance by the delivery of flour made from other wheat. It must therefore be construed in subserviency to the intention to create a bailment which is so plainly manifested in all the other parts of the instrument, and the flour which Foster was bound to return was (although not expressly specified in the particular clause in question) the flour to be manufactured from the wheat received under the contract.

The judgment of the Supreme Court should be reversed, and a new trial ordered.

Chase *v.* Washburn, 1 Ohio St. 244;
Hurd *v.* West, 7 Cow. 752;
Lonegran *v.* Stewart, 55 Ill. 44;
Mallory *v.* Willis, 4 N. Y. Ct. of App. 76;
Inglebright *v.* Hammond, 19 Ohio, 337.

IV.

Where one performs labor upon materials which he knows at the time to be the property of another, title to the product resulting is in the owner of the materials.

GREGORY *v.* STRYKER.

Supreme Court of New York, 1846.

2 Denio, 628.

Where A. takes a wagon to B. for repairs, and after B. has made extensive repairs upon the same it is attached and sold on execution as the property of B.: *held*, that the title to the wagon remained in A.

BEARDSLEY, J.: The principal controversy in this cause is whether the wagon in question when taken by the defendant belonged to the plaintiff or to Rose. The other points were disposed of by the jury under proper instructions from the Court.

As the value of the new materials and labor used and employed in repairing or re-constructing the wagon, greatly exceeded that of the old materials used in the operation, it was urged that this was really a contract with Rose to make a new wagon, and not for the repair of an old one, and therefore, as most of the materials were furnished by him, his right of property in the vehicle would continue until its completion and delivery under the contract.

No doubt, where a manufacturer or mechanic agrees to construct a particular article out of his own materials, or out of materials the principal part of which are his own, the property of the article, until its completion and delivery, is in him and not in the person for whom it was intended to be made: 1 Cowen's Tr. 2d ed. 289; 2 Kent, 361; Merritt *v.* Johnson, 7 John. 473; 1 Chitt. Pl. 7 Am. ed. 381; Atkinson *v.* Bell, 8 Barn. & Cress. 277; 2 Chitt. Com. Law, 270. But it is equally clear, as a general proposition, that where the owner of a damaged or worn-out article delivers it to another person

to be repaired and renovated by the labor and materials of the latter, the property in the article, as thus repaired and improved, is all along in the original owner, for whom the repairs were made, and not in the person making them. The agreement in such case is but an every-day contract of bailment—*locatio operis faciendi:* Story on Bl. 3d ed. §§ 421, 422, a; 2 Kent, 588, and the original owner, so far from losing his general property in the thing thus placed in the hands of another person to be repaired, acquires that right to whatever accessorial additions are made in bringing it to its new and improved condition.

Nor am I aware that in this class of cases it is at all important what the value of the repairs, actual or comparative, may be. No case is referred to which proceeds on that distinction, nor any writer by whom it is adverted to as material. If we adopt this distinction, what shall be its limit? The general property must be in one party to the exclusion of the other, for surely they are not tenants in common in the thing repaired. Shall we then say that where the value of the repairs falls below that of the dilapidated article on which they were made, the original owner has title to the article in its improved condition, and, *vice versa*, where they exceed it in value, title to the article, as repaired and improved, passes over to the person by whom the repairs were made? Such a rule would certainly be plain enough, and probably might be applied, without great difficulty, to any particular case. But it would be found to give rise to a variety of questions never heard of in actions growing out of the reparation of decayed or injured articles; and the rule itself, I am persuaded, has not so much as the shadow of authority for its support. There are a multitude of instances in which the expense of proper repairs greatly exceeds the value of the article on which they are made. It is so in the lowly operation of footing an old pair of boots, and not unfrequently in repairing a broken-down carriage. The principle contended for by the defendant is not necessary for the security of the mechanic by whom the repairs are made. He has a lien for his labor and materials, and may retain possession until his just demands are satisfied: Story on Bl. § 440; Cross' Law of Lien, 331, chap. 21; Chitt. on

Cont. 5th Am. ed. 544, 5; 1 Cowen's Tr. 295; Moore *v.* Hitchcock, 4 Wend. 292; Grinnell *v.* Cook, 3 Hill, 491. This affords ample protection to the mechanic. And who, let me ask, ever heard that his lien was limited to repairs which, in value, fall below that of the original article on which they are made? Yet this limitation must necessarily exist, if the ground assumed by the counsel for the defendant is well taken.

Various cases have arisen in which property in a raw state was delivered by one person to another upon an agreement that it should be wrought upon and improved by the labor and skill of the bailee, and when thus improved in value should be divided in certain proportions between the respective parties; and in which it was held that the original owner retained his exclusive title to the property until the contract had been completely executed; and this, notwithstanding the labor to be performed by the bailee might be equal or even greater in value than that of the property when received by him. Thus, in Pierce *v.* Schenck, 3 Hill, 28, where logs were delivered at a saw-mill, under a contract with the miller that he should saw them into boards and each party should have one-half, it was held to be a bailment and not a sale of the logs, and that the bailor retained his general property until the contract was fully executed. The cases of Barker *v.* Roberts, 8 Greenl. 101, and Rightmyer *v.* Raymond, 12 Wend. 51, as well as many others, are to the same effect. To be sure, these are not cases in which old articles were to be improved by repairs put upon them; yet the bailment in each is of the same nature and class, *locatio operis faciendi;* and as to this question the same principle should apply to both.

If I employ a mechanic to make a new article for me, the right of property while the work is going on may essentially depend upon the original ownership of the materials used in its construction. If they are his, or chiefly his, we have seen that the property remains in him. If, on the other hand, the materials used were mine, the general property is in me, although he may add some small proportion of his own materials: Story on Bl. § 423; 1 Cowen's Tr. 289. The distinction between these cases is, that the first is a contract for the sale of the article in *futuro*, the latter a pure bailment.

It was not pretended that the real design of the plaintiff and Rose was to have a new wagon made in the name of repairing an old one, and that such a trick was resorted to as a mode of placing the property in the vehicle, while being constructed, beyond the reach of the creditors of Rose. We must assume that these parties acted with fairness and meant what they said; that the real object was as expressed, to repair an old wagon, and not to make a new one, although it must be admitted that the process of reparation has resulted in a substantial re-construction of the vehicle. Still the contract was for repairs, and not for a new wagon, which as between the parties to the contract should determine their rights. And as the contract was fair and free from fraud, the defendant, who stands in the place of the creditors of Rose, must abide by his rights. As between the plaintiff and Rose the property was in the former, and his right is the same against this defendant. No error of law therefore occurred on the trial of the cause.

Judgment affirmed.

Pierce *v.* Schenck, 3 Hill, 28;
Barker *v.* Roberts, 8 Greenl. 101;
Rightmyer *v.* Raymond, 12 Wend. 51.

To the same general point.
Babcock *v.* Gill, 10 Johns. 287;
Wright *v.* O'Brien, 5 Daly, 54;
Eaton *v.* Lynde, 15 Mass. 242;
Stevens *v.* Briggs, 5 Pick. 177.

V.

If one by *mistake* and in *good faith expends* labor upon the chattels of another, the owner of the chattels is entitled to the property in its improved condition unless, 1st, the material has been so changed as to lose its identity, or, 2d, has been greatly increased in value.

THE ISLE ROYALE MINING CO. *v.* HERTIN.

Supreme Court of Michigan, 1877.

37 Mich. 332.

COOLEY, C. J.: The parties to this suit were owners of adjoining tracts of timber lands. In the winter of 1873–4 defend-

ants in error, who were plaintiffs in the Court below, in consequence of a mistake respecting the actual location, went upon the lands of the mining company and cut a quantity of cord wood, which they hauled and piled on the bank of Portage Lake. The next spring the wood was taken possession of by the mining company, and disposed of for its own purposes. The wood on the bank of the lake was worth $2.87\frac{1}{2}$ per cord, and the value of the labor expended by plaintiffs in cutting and placing it there was $1.87\frac{1}{2}$ per cord. It was not clearly shown that the mining company had knowledge of the cutting and hauling by the plaintiffs while it was in progress. After the mining company had taken possession of the wood, plaintiffs brought this suit. The declaration contains two special counts, the first of which appears to be a count in trover for the conversion of the wood. The second is as follows:—

"And for that whereas also, the said plaintiff, Michael Hertin, was, in the year 1874 and 1875, the owner in fee simple of certain lands in said county of Houghton, adjoining the lands of the said defendant, and the said plaintiffs were, during the years last aforesaid, engaged as co-partners in cutting, hauling, and selling wood from said lands of said Michael Hertin, and by mistake entered upon the lands of the said defendant, which lands adjoined the lands of the said plaintiff, Michael Hertin, and under the belief that said lands were the lands of the said plaintiff, Michael Hertin, cut and carried away therefrom a large amount of wood, to-wit: one thousand cords, and piled the same upon the shore of Portage Lake, in said county of Houghton, and incurred great expense, and paid, laid out, and expended a large amount of money in and about cutting and splitting, hauling and piling said wood, to-wit: the sum of two thousand dollars, and afterwards, to-wit: on the first day of June, A. D. 1875, in the county of Houghton aforesaid, the said defendant, with force and arms, and without any notice to or consent of said plaintiffs, seized the said wood and took the same from their possession and kept, used, and disposed of the same for its own use and purposes, and the said plaintiffs aver that the labor so as aforesaid done and performed by them, and the expense so as aforesaid incurred, laid out and expended by them in cutting, splitting, hauling, and piling said wood,

amounting as aforesaid to the value of two thousand dollars, increased the value of said wood ten times and constituted the chief value thereof, by reason whereof the said defendant then and there became liable to pay to the said plaintiff the value of the labor so as aforesaid expended by them upon said wood and the expense so as aforesaid incurred, laid out, and expended by them in cutting, splitting, hauling, and piling said wood, to-wit: the said sum of two thousand dollars, and being so liable, the said defendant in consideration thereof, afterwards to-wit: on the same day and year last aforesaid and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs to pay unto the said plaintiffs the said sum of two thousand dollars and the interest thereon."

The Circuit Judge instructed the jury as follows: "If you find that the plaintiffs cut the wood from defendant's land by mistake and without any wilful negligence or wrong, I then charge you that the plaintiffs are entitled to recover from the defendant the reasonable cost of cutting, hauling, and piling the same." This presents the only question it is necessary to consider on this record. The jury returned a verdict for the plaintiffs.

Some facts appear by the record which might perhaps have warranted the Circuit Judge in submitting to the jury the question whether the proper authorities of the mining company were not aware that the wood was being cut by the plaintiffs under an honest mistake as to their rights, and were not placed by that knowledge under obligation to notify the plaintiffs of their error. But as the case was put to the jury, the question presented by the record is a narrow question of law, which may be stated as follows: Whether, where one in an honest mistake regarding his rights, in good faith performs labor on the property of another, the benefit of which is appropriated by the owner, the person performing such labor is not entitled to be compensated therefor to the extent of the benefit received by the owner therefrom? The affirmative of this proposition the plaintiffs undertook to support, having first laid the foundation for it by showing the cutting of the wood under an honest mistake as to the location of their land, the taking possession of the wood afterwards by the mining company, and its value

in the condition in which it then was and where it was, as compared with its value standing in the woods.

We understand it to be admitted by the plaintiffs that no authority can be found in support of the proposition thus stated. It is conceded that at the common law where one thus goes upon the land of another on an assumption of ownership, though in perfect good faith and under honest mistake as to his rights, he may be held responsible as a trespasser. His good faith does not excuse him from the payment of damages, the law requiring him at his peril to ascertain what his rights are and not to invade the possession, actual or constructive, of another. If he cannot thus protect himself from the payment of damages, still less, it would seem, can be established in himself any affirmative rights based upon his unlawful, though unintentional, encroachment upon the rights of another. Such is unquestionably the rule of the common law, and such it is admitted to be.

It is said, however, that an exception to this rule is admitted under certain circumstances, and that a trespasser is even permitted to make title in himself to the property of another where in good faith he has expended his own labor upon it, under circumstances which would render it grossly unjust to permit the other party to appropriate the benefit of such labor.

The doctrine here invoked is the familiar one of title by accession, and though it is not claimed that the present case is strictly within it, it is insisted that it is within its equity, and that there would be no departure from settled principles in giving these plaintiffs the benefit of it.

The doctrine of title by accession is in the common law as old as the law itself, and was previously known in other systems. Its general principles may therefore be assumed to be well settled. A wilful trespasser who expends his money or labor upon the property of another, no matter to what extent, will acquire no property therein, but the owner may reclaim it so long as its identity is not changed by conversion into some new product. Indeed some authorities hold that it may be followed even after its identity is lost in a new product; that grapes may be reclaimed after they have been converted into wine, and grain in the form of distilled liquors: Silsbury *v.*

McCoon, 3 N. Y. 379. See Riddle *v.* Driver, 12 Ala. 590. And while other authorities refuse to go so far, it is on all hands conceded that where the appropriation of the property of another was accidental or through mistake of fact, and labor has in good faith been expended upon it which destroys its identity, or converts it into something substantially different, and the value of the original article is insignificant as compared with the value of the new product, the title to the property in its converted form must be held to pass to the person by whose labor in good faith the change has been wrought, the original owner being permitted, as his remedy, to recover the value of the article as it was before the conversion. This is a thoroughly equitable doctrine, and its aim is so to adjust the rights of the parties as to save both, if possible, or as near as possible, from any loss. But where the identity of the original article is susceptible of being traced, the idea of a change in the property is never admitted, unless the value of that which has been expended upon it is sufficiently great, as compared with the original value, to render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent at the first blush. Perhaps no case has gone further than Wetherbee *v.* Green, 22 Mich. 311, in which it was held that one who, by unintentional trespass, had taken from the land of another young trees of the value of $25, and converted them into hoops worth $700, had thereby made them his own, though the identity of trees and hoops was perfectly capable of being traced and established.

But there is no such disparity in value between the standing trees and the cord wood in this case as was found to exist between the trees and the hoops in Wetherbee *v.* Green.

The trees are not only susceptible of being traced and identified in the wood, but the difference in value between the two is not so great but that it is conceivable the owner may have preferred the trees standing to the wood cut.

The cord wood has a higher market value, but the owner may have chosen not to cut it, expecting to make some other use of the trees than for fuel, or anticipating a considerable rise in value if they were allowed to grow.

It cannot be assumed as a rule that a man prefers his trees

cut into cord wood rather than left standing, and if his right to leave them uncut is interfered with even by mistake, it is manifestly just that the consequences should fall upon the person committing the mistake, and not upon him. Nothing could more encourage carelessness than the acceptance of the principle that one who by mistake performs labor upon the property of another should lose nothing by his error, but should have a claim upon the owner for remuneration.

Why should one be vigilant and careful of the rights of others if such were the law? Whether mistaken or not is all the same to him, for in either case he has employment and receives his remuneration; while the inconveniences, if any, are left to rest with the innocent owner. Such a doctrine offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespass the appearance of an innocent mistake.

A case could seldom arise in which the claim to compensation could be more favorably presented by the facts than it is in this; since it is highly probable that the defendant would suffer neither hardship nor inconvenience if compelled to pay the plaintiffs for their labor. But a general principle is to be tested, not by its operation in an individual case, but by its general workings. If a mechanic employed to alter over one man's dwelling-house shall by mistake go to another which happens to be unoccupied, and before his mistake is discovered, at a large expenditure of labor, shall thoroughly everhaul and change it, will it be said that the owner, who did not desire his house disturbed, must either abandon it altogether, or, if he takes possession, must pay for labor expended upon it which he neither contracted for, desired, nor consented to? And if so, what bounds can be prescribed to which the application of this doctrine can be limited? The man who by mistake carries off the property of another will next be demanding payment for the transportation; and the only person reasonably secure against demands he has never assented to create, will be the person who, possessing nothing, is thereby protected against anything being accidentally improved by another at his cost and to his ruin.

The judgment of the Circuit Court must be reversed, with costs, and a new trial ordered.

Unless, 1st, the material has been so changed as to lose its identity.

BETTS *v.* LEE.

Supreme Court of New York, 1810.

5 Johnson, 348.

PER CURIAM: The evidence detailed in the return to the *certiorari* does not prove that when the suit for a trespass, brought by Bowne *against* Lee, was compromised, the attorney of Bowne, or the present plaintiffs, sold the shingles, etc., to Lee, or permitted him to take them. The thirty dollars paid by Lee to the attorney was for the damages of the trespass he had committed in cutting down the trees. A loose and equivocal observation made at another time to a stranger was not sufficient evidence to establish such a sale or consent. The settling of the suit for the trespass, and recovering a compensation, did not, *per se*, transfer to the trespasser a right to the timber cut down and remaining on the land; nor did the working one part into shingles, and the other part into short logs, change the title to the property.

The civil law required the thing to be changed into a different species, and to be incapable of being restored to its ancient form, as grapes made into wine, before the original proprietor could lose his title; nor even then did the other party acquire any title by the accession, unless the materials had been taken away in ignorance of their being the property of another: Vinnius, Inst. lib. 2, tit. 1, § 25; Dig. 10, 4, 12, 3. The civil law, in its usual wisdom, gave no encouragement to trespassers.

But this very point has been decided against the trespasser by the English common law. It is laid down, in the Year Books, after solemn argument on demurrer, that whatever alteration of form any property has undergone, the owner may seize it in its new shape if he can prove the identity of the original materials; as if leather be made into shoes, or cloth into a coat, or a tree be squared into timber: 5 Hen. VII., 15,

12 Hen. VIII., 10; Fitz. Abr. Bar. 144; Bro. tit. Property, 23. We are of opinion, therefore, that the judgment below ought to be reversed. Judgment reversed.

2 Kent, 364.

Unless, 2d, the material has been greatly increased in value.

WETHERBEE *v.* GREEN.

Supreme Court of Michigan, 1871.

22 Mich. 311.

COOLEY, J.: The defendants in error replevied of Wetherbee a quantity of hoops which he had made from timber cut upon their land. Wetherbee defended the replevin suit on two grounds.

First, he claimed to have cut the timber under a license from one Sumner, who was formerly tenant in common of the land with Green, and had been authorized by Green to give such license. Before the license was given, however, Sumner had sold his interest in the land to Camp and Brooks, the co-plaintiffs with Green, and had conveyed the same by warranty deed; but Wetherbee claimed and offered to show by parol evidence that the sole purpose of this conveyance was to secure a pre-existing debt from Sumner to Camp and Brooks, and that consequently it amounted to a mortgage only, leaving in Sumner, under our statute, the usual right of a mortgagor to occupy and control the land until foreclosure. He also claimed that the authority given by Green to Sumner had never been revoked, and that consequently the license given would be good against Green, and constitute an effectual bar to the suit in replevin, which must fail if any one of the plaintiffs was precluded from maintaining it.

But if the Court should be against him on this branch of the case, Wetherbee claimed further that replevin could not be maintained for the hoops, because he had cut the timber in good faith, relying upon a permission which he supposed proceeded from the parties having lawful right to give it, and had, by the expenditure of his labor and money, converted the trees

into chattels immensely more valuable than they were as they stood in the forest, and thereby he had made such chattels his own. And he offered to show that the standing timber was worth twenty-five dollars only, while the hoops replevied were shown by the evidence to be worth near seven hundred dollars; also, that at the time of obtaining the license from Sumner he had no knowledge of the sale of Sumner's interest, but, on the other hand, had obtained an abstract of the title to the premises from a firm of land agents at the county seat, who kept an abstract book of titles to land in that county, which abstract showed the title to be in Green and Sumner, and that he then purchased the timber, relying upon the abstract and upon Sumner's statement that he was authorized by Green to make the sale. The evidence offered to establish these facts was rejected by the Court, and the plaintiffs obtained judgment.

The principal question which, from this statement, appears to be presented by the record may be stated thus: Has a party who has taken the property of another in good faith and in reliance upon a supposed right, without intention to commit wrong, and by the expenditure of his money or labor worked upon it so great a transformation as that which this timber underwent in being transformed from standing trees into hoops, acquired such a property therein that it cannot be followed into his hands and reclaimed by the owner of the trees in its improved condition?

The objections to allowing the owner of the trees to reclaim the property under such circumstances are that it visits the involuntary wrong-doer too severely for his unintentional trespass, and at the same time compensates the owner beyond all reason for the injury he has sustained. In the redress of private injuries the law aims not so much to punish the wrong-doer as to compensate the sufferer for his injuries; and the cases in which it goes farther and inflicts punitory or vindictive penalties are those in which the wrong-doer has committed the wrong recklessly, wilfully, or maliciously, and under circumstances presenting elements of aggravation.

Where vicious motive or reckless disregard of right are not involved, to inflict upon a person who has taken the property of another a penalty equal to twenty or thirty times its value,

and to compensate the owner in a proportion equally enormous, is so opposed to all legal idea of justice and right and to the rules which regulate the recovery of damages generally that, if permitted by the law at all, it must stand out as an anomaly and must rest upon peculiar reasons.

As a general rule, one whose property has been appropriated by another without authority has a right to follow it and recover the possession from anyone who may have received it; and if, in the meantime, it has been increased in value by the addition of labor or money, the owner may, nevertheless, reclaim it, provided there has been no destruction of substantial identity. So far the authorities are agreed. A man cannot generally be deprived of his property except by his own voluntary act or by operation of law; and if authorized parties have bestowed expense or labor upon it, that fact cannot constitute a bar to his reclaiming it so long as identification is not impracticable. But there must, nevertheless, in reason be some limit to the right to follow and reclaim materials which have undergone a process of manufacture. Mr. Justice Blackstone lays down the rule very broadly, that if a thing is changed into a different species, as by making wine out of another's grapes, oil from his olives, or bread from his wheat, the product belongs to the new operator, who is only to make satisfaction to the former proprietor for the materials converted: 2 Bl. Com. 404. We do not understand this to be disputed as a general proposition, though there are some authorities which hold that in the case of a wilful appropriation no extent of conversion can give to the wilful trespasser a title to the property so long as the original materials can be traced in the improved article. The distinction thus made between the case of an appropriation in good faith and one based on intentional wrong appears to have come from the civil law, which would not suffer a party to acquire a title by accession, founded on his own act, unless he had taken the materials in ignorance of the true owner and given them a form which precluded their being restored to their original condition: 2 Kent, 363. While many cases have followed the rule as broadly stated by Blackstone, others have adopted the severe rule of the civil law where the conversion was in wilful disregard of right. The New York cases of

Betts *v.* Lee, 5 Johns. 348; Curtis *v.* Groat, 6 Johns. 168; and Chandler *v.* Edson, 9 Johns. 362, were all cases where the wilful trespasser was held to have acquired no property by a very radical conversion, and in Silsbury *v.* McCoon, 3 N. Y. 378, 385, the whole subject is very fully examined, and Ruggles, J., in delivering the opinion of the Court, says that the common law and the civil law agree "that if the chattel wrongfully taken come into the hands of an innocent holder, who, believing himself to be the owner, converts the chattel into a thing of different species so that its identity is destroyed, the original owner cannot reclaim it. Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine. In a case of this kind, the change in the species of the chattel is not an intentional wrong to the original owner. It is, therefore, regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace the identity into the manufactured article for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his action for damages as for a thing consumed, and may recover its value as it was when the conversion or consumption took place," and further on he says of the civil law, with which the common law is supposed by him to harmonize: "The acknowledged principle of the civil law is that a wilful wrong-doer acquires no property in the goods of another either by the wrongful taking or by any change wrought in them by his labor or skill, however great that change may be. The new product in its improved state belongs to the owner of the original materials, provided it be proved to be made from them; the trespasser loses his labor, and that change which is regarded as a destruction of the goods, or an alteration of their identity in favor of an honest possessor, is not so regarded as between the original owner and a wilful violator of his right of property." In further illustration of the same views we refer to Hyde *v.* Cookson, 21 Barb. 104; Martin *v.* Porter, 5 M. & W. 351; Wild *v.* Holt, 9 M. & W. 672; Baker *v.* Wheeler, 8 Wend. 508; Snyder *v.* Vaux, 2 Rawle, 427; Riddle *v.* Driver, 12 Ala. 590.

It does not become necessary for us to consider whether the

case of Silsbury *v.* McCoon, 3 N. Y. 378, which overruled the prior decisions of the Supreme Court (reported in 4 Denio, 425, and 6 Hill, 332), has not recognized a right in the owner of the original materials to follow them under circumstances when it would not be permitted by the rule as recognized by the authorities generally. That was the case where a wilful trespasser had converted corn into whiskey, and the owner of the corn was held entitled to the manufactured article. The rule as given by Blackstone would confine the owner, in such case, to his remedy to recover damages for the original taking. But we are not called upon in this case to express any opinion regarding the rule applicable in the case of a wilful trespasser, since the authorities agree in holding that when the wrong had been involuntary the owner of the original materials is precluded, by the civil law and common law alike, from following and reclaiming the property after it has undergone a transformation which converts it into an article substantially different.

The cases of confusion of goods are closely analogous. It has always been held that he who, without fraud, intentional wrong, or reckless disregard of the rights of others, mingled his goods with those of another person in such manner that they could not be distinguished, should, nevertheless, be protected in his ownership so far as the circumstances would permit. The question of motive here becomes of the highest importance; for, as Chancellor Kent says, if the commingling of property "was wilfully made without mutual consent, * * the common law gave the entire property, without any account, to him whose property was originally invaded and its distinct character destroyed: Popham's Rep. 38, pl. 2. If A. will wilfully intermix his corn or hay with that of B., or casts his gold into another's crucible so that it becomes impossible to distinguish what belonged to A. from what belonged to B., the whole belongs to B.: Popham's Rep., *ub. supra;* Warde *v.* Ayre, 2 Bulst. 323;" 2 Kent, 364-5; and see 2 Bl. Com. 404; Hart *v.* Ten Eyck, 2 Johns. Ch. 62; Gordon *v.* Jenney, 16 Mass. 465; Treat *v.* Barber, 7 Com. 280; Barron *v.* Cobleigh, 11 N. H. 561; Roth *v.* Wells, 29 N. Y. 486; Willard *v.* Rice, 11 Met. 493; Jenkins *v.* Steanka, 19 Wis. 128; Hesseltine *v.*

Stockwell, 30 Me. 237. But this rule only applies to wrongful or fraudulent intermixtures. There may be an intentional intermingling and yet no wrong intended; as where a man mixes two parcels together, supposing both to be his own, or, that he was about to mingle his with his neighbor's, by agreement, and mistakes the parcel. In such cases, which may be deemed accidental intermixtures, it would be unreasonable and unjust that he should lose his own or be obliged to take and pay for his neighbor's, as he would have been under the civil law: Morton, J., in Ryder *v.* Hathaway, 21 Pick. 305. In many cases there will be difficulty in determining precisely how he can be protected with due regard to the rights of the other party; but it is clear that the law will not forfeit his property in consequence of the accident or inadvertence, unless a just measure of redress to the other party renders it inevitable: Story, on Bailm. § 40; Sedg. on Dams. 483.

The important question on this branch of the case appears to us to be, whether standing trees, when cut and manufactured into hoops, are to be regarded as so far changed in character that their identity can be said to be destroyed within the meaning of the authorities. And as we enter upon a discussion of this question, it is evident at once that it is difficult, if not impossible, to discover any invariable and satisfactory test which can be applied to all the cases which arise in such infinite variety. "If grain be taken and made into malt, or money taken and made into a cup, or timber taken and made into a house, it is held in the old English law that the property is so altered as to change the title: Bro. tit. Property, pl. 23;" 2 Kent, 363. But cloth made into garments, leather into shoes, trees hewn or sawed into timber, and iron made into bars, it is said, may be reclaimed by the owner in their new and original shape: Sedg. on Dams. 484; Snyder *v.* Vaux, 2 Rawle, 427; Betts *v.* Lee, 5 Johns. 348; Curtis *v.* Groat, 6 Johns. 168; Brown *v.* Sax, 7 Cow. 95; Silsbury *v.* McCoon, 4 Denio, 333, per Bronson, J.; Ibid., 6 Hill, 426, per Nelson, Ch. J.; Ibid., 3 N. Y. 386, per Ruggles, J. Some of the cases place the right of the former owner to take the thing in its altered condition upon the question whether its identity could be made out by the senses: Year-Book 5, H. 7, fo. 15, pl. 6; 4 Denio, 335,

note. But this is obviously a very unsatisfactory test, and in many cases would wholly defeat the purpose which the law has in view in recognizing a change of title in any of these cases. That purpose is not to establish any arbitrary distinctions based upon mere physical reasons, but to adjust the redress afforded to the one party and the penalty inflicted upon the other, as near as circumstances will permit, to the rules of substantial justice.

It may often happen that no difficulty will be experienced in determining the identity of a piece of timber which has been taken and built into a house; but no one disputes that the right of the original owner is gone in such a case. A particular piece of wood might perhaps be traced without trouble into a church organ, or other equally valuable article; but no one would defend a rule of law which, because the identity could be determined by the senses, would permit the owner of the wood to appropriate a musical instrument a hundred or a thousand times the value of his original materials, when the party who, under like circumstances, has doubled the value of another man's corn by converting it into malt is permitted to retain it and held liable for the original value only. Such distinctions in the law would be without reason, and could not be tolerated. When the right to the improved article is the point in issue, the question, how much the property or labor of each has contributed to make it what it is, must always be one of first importance. The owner of a beam built into the house of another loses his property in it, because the beam is insignificant in value or importance as compared to that to which it has become attached, and the musical instrument belongs to the maker, rather than to the man whose timber was used in making it—not because the timber cannot be identified, but because in bringing it to its present condition the value of the labor has swallowed up and rendered insignificant the value of the original materials. The labor, in the case of the musical instrument, is just as much the principal thing as the house is in the other case instanced; the timber appropriated is in each case comparatively unimportant.

No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession

unless it keeps in view the circumstance of relative values. When we bear in mind the fact that what the law aims at is the accomplishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundred-fold is of more importance in the adjustment than any chemical change or mechanical transformation, which, however radical, is neither expensive to the party making it nor adds materially to the value. There may be complete changes with so little improvement in value that there could be no hardship in giving the owner of the original materials the improved article; but in the present case, where the defendant's labor—if he shall succeed in sustaining his offer of testimony—will appear to have given the timber in its present condition nearly all its value, all the grounds of equity exist which influence the Courts in recognizing a change of title under any circumstances.

We are of opinion that the Court erred in rejecting the testimony offered. The defendant, we think, had a right to show that he had manufactured the hoops in good faith and in the belief that he had the proper authority to do so; and, if he should succeed in making that showing, he was entitled to have the jury instructed that the title to the timber was changed by a substantial change of identity, and that the remedy of the plaintiff was an action to recover damages for the unintentional trespass.

This view will dispose of the case upon the present record. Upon the other points we are not prepared to assent entirely to the views of the plaintiff in error. It does not appear to us important that the deed from Sumner to Camp and Brooks was intended as a mere security. Under such a deed Sumner would have had a right of redemption, but it does not follow that he would have been entitled to possession and to all the other rights of mortgagor in the Courts of law. When a deed absolute in form is given to secure a debt, the purpose generally is to vest in the grantee a larger power of control and disposition than he would have by statute under any ordinary mortgage; and we are not prepared to say that the statute—Comp. L., § 4614—which forbids ejectment by mortgages before foreclosure was intended to reach a case of that description. We

think, however, that the mere circumstance of the sale of Sumner's interest did not operate in law as a revocation of the authority previously given to Sumner to sell the timber. It is quite possible that Green would not have given his authority had Sumner not been tenant in common of the land with him; but there is no absolute presumption of the law to that effect; and we cannot say that Green would have revoked the authority had he been aware of Sumner's conveyance. Nor was it necessary that the license given by Sumner to Wetherbee should have been in any particular form. A mere license to enter upon land and cut timber does not confer a legal right to do so; but it nevertheless protects the licensee so far as he has acted under it before revocation, and the protection does not depend upon its form, but upon what has been done having proceeded by consent. However informal the consent may have been, the land-owner cannot be allowed, by afterwards recalling it, to make the licensee a trespasser for what he has done in reliance upon it.

For the reasons given, the judgment must be reversed, with costs, and a new trial ordered.

VI.

But where one *wilfully* and *wrongfully* takes the materials of another, and by his labor and skill changes it into another form, no matter how great the change may be, if the new article can be proved to have been made from the original material, the title thereto still remains in the owner of that material.

SILSBURY *v.* MCCOON.

Court of Appeals of State of New York, 1850.

3 New York Ct. of App. 379.

RUGGLES, J. It is an elementary principle in the law of all civilized communities that no man can be deprived of his property except by his own voluntary act or by operation of

law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such wrongful taking. The subsequent possession by the thief or the trespasser is a continuing trespass; and if during its continuance the wrong-doer enhances the value of the chattel by labor and skill bestowed upon it, as by sawing logs into boards, splitting timber into rails, making leather into shoes, or iron into bars or into a tool, the manufactured article still belongs to the owner of the original material, and he may retake it or recover its improved value in an action for damages. And if the wrong-doer sell the chattel to an honest purchaser having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser, because the trespasser had none to give. The owner of the original material may still retake it in its improved state, or he may recover its improved value. The right to the improved value in damages is a consequence of the continued ownership. It would be absurd to say that the original owner may retake the thing by an action of replevin in its improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages. Thus far, it is conceded that the common law agrees with the civil.

They agree in another respect, to wit, that if the chattel wrongfully taken afterwards come into the hands *of an innocent holder*, who, believing himself to be the owner, converts the chattel into a thing of different species, so that its identity is destroyed, the original owner cannot reclaim it. Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine. In a case of this kind the change in the species of the chattel is not an intentional wrong to the original owner. It is therefore regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace their identity into the manufactured article for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his action for damages as for a thing consumed, and may recover its value as it was when the conversion or consumption took place.

There is great confusion in the books upon the question what

constitutes change of identity. In one case, 5 Hen. 7, fol. 15, it is said that the owner may reclaim the goods so long as they may be known, or, in other words, ascertained by inspection. But this in many cases is by no means the best evidence of identity; and the examples put by way of illustration serve rather to disprove than to establish the rule. The Courts say that if grain be made into malt, it cannot be reclaimed by the owner, because it cannot be known. But if cloth be made into a coat, a tree into square timber, or iron into a tool, it may. Now as to the cases of the coat and the timber, they may or may not be capable of identification by the senses merely; and the rule is entirely uncertain in its application; and as to the iron tool, it certainly cannot be identified as made of the original material without other evidence. This illustration, therefore, contradicts the rule. In another case, Moore's Rep. 20, trees were made into timber, and it was adjudged that the owner of the trees might reclaim the timber "because the greater part of the substance remained." But if this were the true criterion, it would embrace the cases of wheat made into bread, milk into cheese, grain into malt, and others which are put in the books as examples of a change of identity. Other writers say that when the thing is so changed that it cannot be reduced from its new form to its former state, its identity is gone. But this would include many cases in which it has been said by the Courts that the identity is not gone; as the case of leather made into a garment, logs into timber or boards, cloth into a coat, etc. There is, therefore, no definite settled rule on this question; and although the want of such a rule may create embarrassment in a case in which the owner seeks to reclaim his property from the hands of an honest possessor, it presents no difficulty where he seeks to obtain it from the wrong-doer; provided the common law agrees with the civil in the principle applicable to such a case.

The acknowledged principle of the civil law is that a wilful wrong-doer acquires no property in the goods of another, either by the wrongful taking or by any change wrought in them by his labor or skill, however great that change may be. The new product, in its improved state, belongs to the owner of the original materials, provided it be proved to have been made

from them; the trespasser loses his labor, and that change which is regarded as a destruction of the goods, or an alteration of their identity in favor of an honest possessor, is not so regarded as between the original owner and a wilful violator of his right of property.

These principles are to be found in the digest of Justinian, lib. 10, tit. 4, leg. 12, § 3: "If any one shall make wine with my grapes, oil with my olives, or garments with my wool, *knowing they are not his own*, he shall be compelled by action to produce the said wine, oil, or garments." So in Vinnius' Institutes, tit. 1, pl. 25: "He who knows the material is another's ought not to be considered in the same light as if he had made the species in the name of the owner, to whom also he is to be understood to have given his labor."

The same principle is stated by Puffendorf in his Law of Nature and of Nations, b. 4, ch. 7, § 10, and in Wood's Institutes of the civil law, p. 92, which are cited at large in the opinion of Jewett, J., delivered in this case in the Supreme Court, 4 Denio, 338, and which it is unnecessary here to repeat. In Brown's Civil and Admiralty Law, p. 240, the writer states the civil law to be that the original owner of any thing improved by the act of another retained his ownership in the thing so improved, unless it was changed into a different species; as if his grapes were made into wine, the wine belonged to the maker, who was only obliged to pay the owner for the value of his grapes. This species, however, must be incapable of being restored to its ancient form; *and the materials must have been taken in ignorance of their being the property of another.*

But it was thought in the Court below that this doctrine had never been adopted into the common law, either in England or here; and the distinction between a wilful and an involuntary wrong-doer hereinbefore mentioned was rejected, not only on that ground, but also because the rule was supposed to be too harsh and rigorous against the wrong-doer.

It is true that no case has been found in the English books in which that distinction has been expressly recognized; but it is equally true that in no case until the present has it been repudiated or denied. The common law on this subject was evidently borrowed from the Roman at an early day, and at a

period when the common law furnished no rule whatever in a case of this kind. Bracton, in his treatise compiled in the reign of Henry III., adopted a portion of Justinian's Institutes on this subject without noticing the distinction; and Blackstone in his Commentaries, vol. 2, p. 404, in stating what the Roman law was, follows Bracton, but neither of these writers intimates that on the point in question there is any difference between the civil and the common law. The authorities referred to by Blackstone in support of his text are three only. The first in Brook's Abridgment, tit. Property 23, is the case from the Year Book 5 H. 7, fol. 15 (translated in a note to 4 Denio, 335), in which the owner of leather brought trespass for taking slippers and boots, and the defendant pleaded that he was the owner of the leather and bailed it to J. S., who gave it to the plaintiff, who manufactured it into slippers and boots, and the defendant took them as he lawfully might. The plea was held good and the title of the owner of the leather unchanged. The second reference is to a case in Sir Francis Moore's reports, p. 20, in which the action was trespass for taking timber, and the defendant justified on the ground that A. entered on his land and cut down trees and made timber thereof, and carried it to the place where the trespass was alleged to have been committed, and afterwards gave it to the plaintiff, and that the defendant therefore took the timber as he lawfully might. In these cases the chattels had passed from the hands of the original trespasser into the hands of a third person; in both it was held that the title of the original owner was unchanged, and that he had a right to the property in its improved state against the third person in possession. They are in conformity with the rule of the civil law; and certainly fail to prove any difference between the civil and the common law on the point in question. The third case cited is from Popham's reports, p. 38, and was a case of confusion of goods. The plaintiff voluntarily mixed his own hay with the hay of the defendant, who carried the whole away, for which he was sued in trespass; and it was adjudged that the whole should go to the defendant; and Blackstone refers to this case in support of his text, that "our law to guard against fraud gives the entire property, without any account to him whose original dominion is invaded

and endeavored to be rendered uncertain without his own consent." The civil law in such a case would have required him who retained the whole of the mingled goods to account to the other for his share: Just. Inst. lib. 2, tit. 1, § 28; and the common law in this particular appears to be more rigorous than the civil; and there is no good reason why it should be less so in a case like that now in hand, where the necessity of guarding against fraud is even greater than in the case of a mingling of goods, because the cases are likely to be of more frequent occurrence. Even this liability to account to him whose conduct is fraudulent seems by the civil law to be limited to cases in which the goods are of such a nature that they may be divided into shares or portions, according to the original right of the parties; for by that law, if A. obtain by fraud the parchment of B. and write upon it a poem, or wrongfully take his tablet and paint thereon a picture, B. is entitled to the written parchment and to the painted tablet, without accounting for the value of the writing or of the picture: Just. Inst. lib. 2, tit. 1, §§ 23, 24. Neither Bracton nor Blackstone have pointed out any difference, except in the case of confusion of goods, between the common law and the Roman, from which on this subject our law has mainly derived its principles.

So long as property wrongfully taken retains its original form and substance, or may be reduced to its original materials, it belongs, according to the admitted principles of the common law, to the original owner, without reference to the degree of improvement, or the additional value given to it by the labor of the wrong-doer. Nay more, this rule holds good against an innocent purchaser from the wrong-doer, although its value be increased an hundred-fold by the labor of the purchaser. This is a necessary consequence of the continuance of the original ownership.

There is no satisfactory reason why the wrongful conversion of the original materials into an article of a different name or a different species should work a transfer of the title from the true owner to the trespasser, provided the real identity of the thing can be traced by evidence. The difficulty of proving the identity is not a good reason. It relates merely to the convenience of the remedy, and not at all to the right. There is no more

difficulty or uncertainty in proving that the whiskey in question was made of Wood's corn, than there would have been in proving that the plaintiff had made a cup of his gold, or a tool of his iron ; and yet in those instances, according to the English cases, the proof would have been unobjectionable. In all cases where the new product cannot be identified by mere inspection, the original material must be traced by the testimony of witnesses from hand to hand through the process of transformation.

Again. The Court below seem to have rejected the rule of the civil law applicable to this case, and to have adopted the principle not heretofore known to the common law; and for the reason that the rule of the civil law was too rigorous upon the wrong-doer, in depriving him of the benefit of his labor bestowed upon the goods wrongfully taken. But we think the civil law in this respect is in conformity, not only with plain principles of morality, but supported by cogent reasons of public policy ; while the rule adopted by the Court below leads to the absurdity of treating the wilful trespasser with greater kindness and mercy than it shows to the innocent possessor of another man's goods. A single example may suffice to prove this to be so. A trespasser takes a quantity of iron ore belonging to another and converts it into iron, thus changing the species and identity of the article ; the owner of the ore may recover its value, in trover or trespass ; but not the value of the iron, because under the rule of the Court below it would be unjust and rigorous to deprive the trespasser of the value of his labor in the transmutation. But if the same trespasser steals the iron and sells it to an innocent purchaser, who works it into cutlery, the owner of the iron may recover of the purchaser the value of the cutlery, because by this process the original material is not destroyed, but remains, and may be reduced to its former state ; and according to the rule adopted by the Court below as to the change of identity the original ownership remains. Thus the innocent purchaser is deprived of the value of his labor, while the guilty trespasser is not.

The rule adopted by the Court below seems, therefore, to be objectionable, because it operates unequally and unjustly. It not only divests the true owner of his title without his consent, but it obliterates the distinction maintained by the civil law,

and as we think by the common law, between the guilty and the innocent, and abolishes a salutary check against violence and fraud upon the rights of property.

We think, moreover, that the law on this subject has been settled by judicial decisions in this country. In Betts *v.* Lee, 5 John. 349, it was decided that as against a trespasser the original owner of the property may seize it in its new shape, whatever alteration of form it may have undergone, if he can prove the identity of the original materials. That was a case in which the defendant had cut down the plaintiff's trees and made them into shingles. The property could neither be identified by inspection nor restored to its original form, but the plaintiff recovered the value of the shingles. So in Curtis *v.* Groat, 6 John. 169, a trespasser cut wood on another's land and converted it into charcoal. It was held that the charcoal still belonged to the owner of the wood. Here was a change of the wood into an article of different kind and species. No part of the substance of the wood remained in its original state; its identity could not be ascertained by the senses, nor could it be restored to what it originally was. That case distinctly recognizes the principle that a wilful trespasser cannot acquire a title to property merely by changing it from one species to another. And the late Chancellor Kent, in his Commentaries, Vol. 2, p. 363, declares that the English law will not allow one man to gain a title to the property of another upon the principle of accession, if he took the other's property wilfully as a trespasser; and that it was settled as early as the time of the year books, that whatever alteration of form any property had undergone, the owner might seize it in its new shape, if he could prove the identity of the original materials.

The same rule has been adopted in Pennsylvania. Snyder *v.* Vaux, 2 Rawle, 427. And in Maine and Massachusetts it has been applied to a wilful intermixture of goods: Ryder *v.* Hathaway, 21 Pick. 304, 5; Wingate *v.* Smith. 7 Shep. 287; Willard *v.* Rice, 11 Metc. 493.

We are therefore of opinion that if the plaintiffs below, in converting the corn into whiskey, knew that it belonged to Wood, and that they were thus using it in violation of his right, they acquired no title to the manufactured article, which, although

changed from the original material into another of different nature, yet being the actual product of the corn, still belonged to Wood. The evidence offered by the defendants and rejected by the Circuit Judge ought to have been admitted.

The right of Wood's creditors to seize the whiskey, by their execution, is a necessary consequence of Wood's ownership. Their right is paramount to his, and of course to his election to sue in trover or trespass for the corn.

The judgment of the Supreme Court should be reversed, and a new trial ordered.

Gardiner, Jewett, Hurlbut, and Pratt, JJ., concurred.

2 Kent, 363;
Curtiss *v.* Groat, 6 Johns. 169;
Snyder *v.* Vaux, 2 Rawle, 427;

See note to Silsbury *v.* McCoon, *supra.*

An innocent purchaser from the wrong-doer who should change or improve the material taken, would stand in the shoes of an innocent taker; but if the purchaser who knows the material he buys to have been wrongfully taken, greatly changes its form and increases its value, he does not, by such means, acquire title thereto.

Silsbury *v.* McCoon, *supra.*

VII.

MEASURE OF DAMAGES.

If the property is innocently taken and increased in value by the labor of the person taking it, in an action for conversion the measure of damages is the value of the property at the time the property was taken.

HINMAN *v.* HEYDERSTADT.

Supreme Court of Minn. 1884.

32 Minn. 250.

VANDERBURGH, J. The Court below ruled that inasmuch as the defendants are admitted to have cut and carried away the hay in controversy in good faith and under a claim of title,

and believing that they owned the land, plaintiff's recovery should be limited to the value of the standing grass. The jury, under the instructions of the Court and in conformity with this rule, rendered a general verdict for the plaintiff, and also found specially the value of the hay after it was cured and put up.

The sole question for us to consider in this appeal is whether, under the circumstances, judgment should be entered for the amount of the general or special verdict. It is assumed that defendant's entry and occupancy while engaged in cutting the hay was peaceable and under a *bona fide* claim of title to the premises, which, in a subsequent litigation between the parties, has been adjudged invalid.

In Washburn *v.* Cutter, 17 Minn. 335 (361), the plaintiff was the owner, and constructively in the possession, of pine lands which were unoccupied, and upon which defendant entered and cut and carried away pine logs and timber, under a claim of title based upon a tax deed which was in fact void. The Court held that such entry and removal of the timber did not constitute a disseizin or adverse possession, and that defendant was to be regarded as a trespasser, and plaintiff entitled to follow and recover the logs in replevin. Whether, if he had waived his right to reclaim the property itself, and had sued for damages in trover or trespass, he would have been entitled to have recovered the full value of the logs, was not considered.

Had that issue been involved in the case, its determination might have been influenced by the character of defendant's claim, and the nature of his title, as well as the circumstances of the alleged trespass, as bearing on the good faith of the transaction: Grant *v.* Smith, 26 Mich. 201; Winchester *v.* Craig, 33 Mich. 205, 221.

In Nesbitt *v.* St. Paul Lumber Co., 21 Minn. 491, logs appeared to have been wrongfully cut and carried away from plaintiff's land without his permission and without any color or claim of title, and this Court held that plaintiff was entitled to recover in trover the full value of the logs which had been driven into the boom and sold to the defendants, who were innocent purchasers. The defendants could not claim to be credited with the additional value which the wrong-doers had

imparted to the logs by acts involving a wilful trespass upon the rights of the plaintiff. Had the value of the logs been enhanced by the expenditure of further labor thereon by defendants in good faith before demand by plaintiff, as to such additional value a different question would have been presented.

The case of Nesbitt *v.* St. Paul Lumber Co. is approved and followed by the Supreme Court of the United States in Woodenware Co. *v.* United States, 106 U. S. 432. The Court, in that case, also declares that the weight of authority, both in this country and in England, is that where a trespass is the result of inadventure or mistake, and the wrong is not intentional, the value of the property when first taken must govern; or if the conversion sued for was after value had been added to it by the work of the defendant, he should, in such case, be credited with this addition: Winchester *v.* Craig, 33 Mich. 205. This rule is reasonable, and is grounded in plain principles of justice, and it is clearly applicable to the case at bar. One who has peaceably entered and cut hay upon unoccupied premises to which he honestly believes his title to be good, clearly ought not be mulcted in damages beyond the amount actually suffered by the prevailing party; and he, of course, could not be if he were in actual adverse possession of the premises.

Order affirmed.

Woodenware Co. *v.* U. S., 106 U. S. 432;

Winchester *v.* Craig, 33 Mich 205.

TO SAME POINT.

But if property is taken wilfully and not by mistake, and the wrong-doer increases its value by labor or otherwise, the measure of damages in an action for conversion is the value of the property at the time of conversion, even though in the hands of an innocent purchaser.

NESBITT *v.* ST. PAUL LBR. CO.

Supreme Court of Minnesota, 1875.

21 Minn. 491.

GILFILLAN, C. J. The jury in this case have settled the questions that the plaintiff was the owner of the logs and that the defendant converted them at Anoka. The defendant claims that because they were enhanced in value by the labor of the original wrong-doer in cutting them, and by the expense of transporting them to Anoka, the plaintiff is not entitled to recover the enhanced value; that is, that he is not entitled to recover the full value at the time and place of the conversion. That plaintiff did not lose his property in the logs by the wrongful removal of them is admitted. He was as much the owner of them at Anoka, where they were converted, as on his land, where they were wrongfully taken from him. This being so, his right to recover the logs themselves, or their value at the time and place of conversion, would seem to follow of course.

The only case in which a different rule was adopted is Single *v.* Schneider, 30 Wis. 570, a case nearly analogous to this, in which the Court, while it admitted the right of the owner to recover the logs by replevin, held that he could recover only the value of the stumpage, and not the enhanced value. This case we consider at variance, not only with every adjudication on the point, but with principle; for the wrong-doer can be permitted to retain a part of the value only on the ground that

he has a property in the chattel to the extent of that part of the value that he is allowed to retain. We cannot better state the rule acknowledged by all the cases, except that in Wisconsin, than by quoting from the opinion of the Court in Silsbury *v.* McCoon, 3 N. Y. 379: "And if the wrong-doer sell the chattel to an honest purchaser, having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser, because the trespasser had none to give. The owner of the original material may still retake it in its improved state, or he may recover its improved value. The right to the improved value in damages is a consequence of the continued ownership. It would be absurd to say that the original owner may retake the thing by an action of replevin, in its improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages."

The judgment appealed from is affirmed.

CONFUSION OF GOODS.

Confusion of goods is such a mixture of the goods of two or more parties that they cannot be distinguished, and such confusion may arise: 1st, by consent of parties; 2d, by mistake; 3d, by inevitable accident; and 4th, by the wrongful act of one or more of the parties.

I.

BY CONSENT.

Where the mixture is by CONSENT of parties, the law presumes that they intended to hold the mass as tenants in common.

DALE *v.* OLMSTEAD.

Supreme Court of Illinois, 1864.

36 Ill. 150.

WALKER, C. J. It appears that Fairfield & Weld were engaged as partners in the business of warehousemen, and in buying, selling, and storing grain. During the continuance of their business they became indebted to appellants in the sum of about $9000, upon which a judgment was obtained by Martin, we suppose as assignee, in December, 1859, which he assigned to appellants. Execution was sued out on this judgment, and placed in the hands of the sheriff of La Salle County on the 22d day of December, 1859.

On the day previous, Fairfield & Weld, to secure this indebtedness, assigned, transferred, and delivered the corn then in store in their warehouse and cribs, as well as certain contracts entered into by them with divers persons for the purchase of

corn, upon a portion of which Fairfield & Weld had advanced some money and had received a part of the corn. That in receiving and storing corn on commission, as well as their own, Fairfield & Weld, as is customary with grain warehousemen, stored all together, without discrimination, not having kept any individual's portion separate from the other.

As assignee of Fairfield & Weld, appellants went into possession, and delivered corn in store on the grain receipts of Fairfield & Weld, or, in lieu of such a delivery, purchased their receipts from holders. They likewise received corn on the contracts entered into by Fairfield & Weld, which seems to have been placed in common mass in store. Cushman, True & Co., holding receipts for corn stored with Fairfield & Weld, brought an action of replevin for about 7000 bushels of corn, against the sheriff of La Salle County, who had levied the execution placed in his hands on the 22d day of December, upon the corn found in possession of Fairfield & Weld, which Cushman, True & Co. recovered on the trial of the cause. When appellants came to deliver out the corn to the various holders of receipts, it was found to be deficient in quantity.

Each holder of receipts claimed the full amount placed in store by him. And this bill was exhibited to settle the entire matter between all parties.

It appears that the assignment to appellants was verbal, but the evidence shows that they, at the time, agreed to deliver the corn in store to the different holders of Fairfield & Weld's receipts. They, by the assignment, only acquired the property and the interest of the firm of Fairfield & Weld, subject to all existing liens. When they went into possession, it was as trustees, for the benefit of all parties in interest, and they could not rightfully appropriate or divert any portion of the property of other persons which thus came to their hands to their own use. They must also be held to account strictly for all such property which thus came to their hands. But by the arrangement they acquired the right to apply all of the firm property, acquired by the assignment, in discharge of their claim against the firm. They were only bound to deliver the corn belonging to holders of receipts which was in store at the

time. Having done so, they were exonerated from further liability.

They contracted for no greater liability. And if Fairfield & Weld owned any corn then in store, it became theirs, and they were authorized to retain it.

Appellants likewise became, by the assignment, the equitable owners of the contracts entered into by Fairfield & Weld for the purchase of corn. When that firm entered into such agreements, and advanced their own money, it was on their own account, and for their own benefit, and not for those storing grain with them. Such persons had no interest in or liens upon such contracts, or the money advanced either by Fairfield & Weld or by appellants to fulfil such agreements. Persons holding grain receipts only had the obligation of the warehousemen for the proper storage and delivery of their grain, according to the terms of their receipts, or, on default, to recover of the bailees the damages growing out of a breach of the contract. The giving of the receipts created no specific or general lien on the property of the warehousemen. Their property remained subject to sale and transfer precisely as though such receipts had never been given. The property of those storing it remained theirs, the same as if it had been placed in the hands of any other agent or bailee. Appellants, by the assignment, became entitled to complete the contracts for the purchase of corn entered into by Fairfield & Weld, and appropriate the corn thus received to their own debt, after deducting the money advanced to complete them, and it was error in the Court below to appropriate this fund to make good the deficit found to exist in the quantity of corn in store.

Appellants, when they purchased up receipts for corn in store, given by Fairfield & Weld, had no right to appropriate to themselves the full amount of corn for which they were given. The corn all having been intermingled, according to usage with warehousemen, and without objection of the several owners, it became common property, owned by all in the proportions in which each had contributed to the common stock. This is so from the very necessity of the case, because so soon as it is intermingled each person's portion loses its identity, and can no longer be distinguished or separated from the common mass.

Neither of the owners could point out, separate, or prove that any particular portion was his. Neither can it be shown, when a portion has been lost or misappropriated, whose particular corn it was. It then being owned in common, they are all liable to sustain any loss which may occur by diminution, decay, or otherwise, in the same proportion. As there was a deficiency in the quantity, in this case, each owner was bound to sustain a *pro rata* portion of that loss. And appellants, by purchasing these receipts, became liable to sustain their *pro rata* share of this loss, precisely as were the persons from whom they purchased the receipts. And so any holders of receipts who have received the full amount, or a larger portion than their ratable share, are bound to account for such surplus over and above their *pro rata* portion.

The only remaining question is whether a Court of equity has jurisdiction of the case. By the assignment, appellants became trustees for all parties in interest, and as such became liable to perform all the duties imposed by that relation. One of the duties of that relation is to account for the proper application of the trust fund. And a Court of equity, as a part of its original and inherent jurisdiction, compels the proper application of the trust fund, and requires the trustees to render an account of his proceedings under the trust. Had this property remained separate it would be different, as in that case the loss of each owner could have been ascertained, and the remedy at law would have been complete. It will also be observed that there is not a complete remedy at law, as by the confusion in the property each party is disabled from showing the extent of his loss. And those who should first sue would get more than their ratable portion of the property, appellants not being liable to make up the deficiency unless it could be shown that they had appropriated the grain to their own use. Thus a portion of the owners would be able to obtain no portion of the grain. And they would have no remedy except in a Court of equity to compel contribution.

A Court of equity has, therefore, jurisdiction to bring all the parties in interest before the Court, and to do complete justice between them. It should ascertain the deficiency of the joint property, and decree that each joint owner share the loss in *pro*

rata proportions, and if any of the owners have received from the common stock more than their proportion, that they contribute the excess to those who have not received their proper proportion. And at the same time decree that Fairfield & Weld, or appellants, whichever may be shown to have misappropriated the corn, pay to the several owners the losses they may have sustained by the loss of their grain whilst in their hands. Thus complete justice will be done, and a multiplicity of suits and expense avoided.

The decree of the Court below is reversed and the cause remanded.

Decree reversed.

2 Blackstone, 405 ;
2 Kent, 364 ;
Story on Bailments, § 40 ;
2 Schouler, P. P. § 65 ;
Nolen *v.* Colt, 6 Hill, 461 ;
Law *v.* Martin, 18 Ill. 286 ;
Dale *v.* Olmstead, 41 Id. 344 ;
Bailey *v.* Bensley, 87 Id. 556 ;
White *v.* Brooks, 55 N. H. 402.

II.

BY MISTAKE.

If the confusion results from MISTAKE without the elements of wilfulness or fraud, the party causing the confusion will not lose his property, but each will have a title to the mixture *pro rata.*

PRATT *v.* BRYANT.

Supreme Court of Vermont, 1848.

20 Vt. 333.

Where one by mistake mingled his wood with the wood of another, so that it was indistinguishable ; *held*, that he did not lose his property therein.

REDFIELD, J. This does not seem to be such a case of fraudulent commixture of goods as to produce a forfeiture on the part of the plaintiff. The rule laid down by Justice Norton in Ryder *v.* Hathaway, 21 Pick. 298, seems to us to be the true

rule upon the subject,—that if the intermixture were intentional, but by some mistake of the facts, the property was not lost. That seems to be the present case. The plaintiff supposed he had made a contract of sale; but in fact he had not. This was his innocent mistake. He may therefore recover either his property or the pay for it. He should first show a demand and refusal, unless the defendant have used it, knowing it to belong to the plaintiff, which is not this case. If the defendant use it by mistake or refused to suffer the plaintiff to take it away,—one of which is virtually true in this case,—he is liable in trover; or if he have sold the property and received money for it, the plaintiff may waive the tort and sustain assumpsit for the money: 21 Pick. 306, citing Bond *v.* Ward, 7 Mass. 127.

But we think no action of assumpsit will lie, unless in a case like the one last put, or when there has been a sale, either express or implied, and that the action of book account could not with the least propriety be extended to a case like the present. The present case, upon the most favorable construction for the plaintiff, is the putting of his wood with the defendant's, under a mistake of facts, without the fault of the defendant. There was no contract of sale; but the contrary is expressly found. We are to understand that the plaintiff was not justified in supposing there was any contract of sale closed, for if that were the case it would amount to a contract. The fault, then, was that of the plaintiff, but not wilful or fraudulent, but negligent.

Can the plaintiff, then, be considered in any more favorable light than if had left his wood upon the defendant's land as a naked deposit, and the defendant had used it without his consent. And in no such case could an action of book account be maintained. Nor could such action be maintained upon the defendant's refusal to deliver the wood upon request, or to permit the plaintiff to remove it. This action will never lie for damages sustained by reason of any breach of duty as a bailee, whatever be the character of the bailment. Nor will this action lie to recover damages, which are in their nature the result of a tort. The only ground of recovery here is for the defendant's refusal to allow the plaintiff to take away so much wood as he put there by mistake. This they should have

done; but their refusal was a mere tort; and the damages could no more be recovered in this action than in all cases of conversion of personal chattels.

There are, in our opinion, strong reasons, in the justice of the case, why this action should not be extended to a case like the present. The commixture is not without the fault of the plaintiff, although not fraudulent in such a sense as to work a forfeiture. In all such cases the claimant will be supposed to be first in fault, in mixing his goods with his neighbor's, and to be wholly conversant of the facts. To allow him, then, to come into Court for redress, upon the force of his own testimony, and virtually excluding the innocent party, who is not supposed to have equal knowledge of the fact, not having been present at the time of the commixture, will be to allow a party to derive a positive advantage from his own wrong. It is sufficiently favorable to the plaintiff to relieve him from the forfeiture and to allow him to recover upon common law proof.

Judgment reversed and judgment for defendants.

Rider *v.* Hataway, 21 Pick. 298; Wetherbee *v.* Green, 22 Mich. 311; Smith *v.* Sanborn, 6 Grey, 134; Thome *v.* Colton, 27 Ia. 425; Stone *v.* Quaale, 36 Minn. 46.

III.

BY ACCIDENT.

Where the confusion is occasioned by ACCIDENT, the respective owners will still retain their proportionate part of the mixture.

MOORE *v.* ERIE R. R. CO.

Supreme Court of New York, 1872.

7 Lans. 39.

MULLEN, P. J. This action was commenced before a Justice of the Peace of the County of Cattaraugus, to recover the value of a quantity of fire-wood, which it was alleged the defendant had converted to his own use. The defendant denied the com-

plaint, and set up a counter-claim. The Court rendered judgment in favor of the plaintiff and against the defendant for the sum of sixty-seven dollars and fifty-five cents damages and costs.

The defendant appealed to the County Court; and on the trial in that Court it appeared that the plaintiff, in the winter of 1865, drew and piled on the land of the defendant, near one of its stations, fifteen cords of hemlock wood. The defendant had piled near to that of the plaintiff a large quantity of hemlock wood, part of which had been sawed.

In March, 1865, there was a great freshet in the Alleghany River, so that it overflowed its banks, and its waters extended to the wood of the plaintiff and defendant and carried it away, lodging part of it in the fields and part in the woods near by.

The wood of the plaintiff and defendant was so intermingled as to be undistinguishable.

The defendant caused the whole of the wood to be gathered and placed in its wood-shed, at an expense of seventy-five cents per cord. The wood was worth four dollars and fifty cents per cord.

Plaintiff's counsel offered to prove that he told defendant's station agent, at the station near which his wood was piled, that defendant's employés were going to pick up the wood, and he (plaintiff) would like to have his pay for it. This evidence was objected to by defendant's counsel. The objection was overruled, and the evidence offered received.

The Court charged the jury that if plaintiff piled his wood in defendant's yard without permission, and it got mingled with defendant's wood without defendant's fault, so that it could not be identified, plaintiff was not entitled to recover.

That if plaintiff's wood floated away and got mingled with defendant's wood, defendant had the right to pick it up and pile it in its wood-shed, and plaintiff could not recover its value until defendant had used the wood, or did some other act converting it.

The Court also charged that the plaintiff was entitled to interest, if the jury found for the plaintiff, from the time defendant used the wood. To this part of the charge defendant's

counsel excepted, on the ground there was no proof that defendant had ever used any part of plaintiff's wood.

The jury found a verdict in favor of the plaintiff for sixty-six dollars and twelve cents.

Judgment was entered for the sum, together with costs, and from that judgment defendant appeals.

The wood of the plaintiff and defendant became intermingled without the fault of either; hence neither lost his right to take the wood if he could identify it. But being indistinguishable the one from the other, they became tenants in common of the wood, each being entitled in the joint property to the number of cords of which he was owner before the confusion of the wood.

Each owner was entitled to collect the wood. and he was entitled to a compensation for his labor for the joint benefit for his co-tenants.

The defendant might appropriate to its use the portion of the wood to which it was entitled, but it was entitled to leave for plaintiff a quantity equal to his share; and such user was no conversion of the plaintiff's share of the wood.

But if defendant used the whole, or failed to leave for plaintiff his full share, the defendant was liable for so much as the quantity left fell short of plaintiff's share.

The plaintiff was not bound to wait in order to entitle him to his share until the whole was used or otherwise converted by defendant. He might have demanded his portion of the wood; and if defendant refused to allow him to take it, it would have been liable for the value of the wood.

No demand was made of the company, unless the conversation with the station agent, or the letter to the defendant's wood agent, was equivalent to a demand of the wood.

The conversation with the station agent was wholly incompetent, being wholly immaterial, unless it would be some evidence of a demand and refusal. The jury might have given that effect to the evidence. But it is not shown that the station agent had anything to do with the wood, or any authority to bind defendant in any way in reference to the wood.

The reception of this evidence is fatal to the judgment. It was proved by plaintiff that he sent a letter to defendant's

wood agent in reference to the wood, but received no answer. The agent says he received a letter from plaintiff, but whether it contained a demand for the wood or its value we are not informed. There is, therefore, no proof of a demand of and a refusal by the defendant or any authorized agent.

The only other evidence of a conversion is that of the plaintiff, who testifies that he saw the engineer of the defendant putting wood on the engines from sheds in which the wood, of which defendant's formed a part, was piled.

It does not appear but that they left in the shed the whole quantity to which plaintiff was entitled. Until it is shown that this was not done, there is no proof of conversion entitling plaintiff to recover. The charge, so far as it related to the merits of the action, is not excepted to. The portion of it relating to interest is excepted to. But if the allowance of interest was erroneous, the judgment need not be reversed, as the defendant could be protected by a modification.

But this part of the charge had, I have no doubt, an important bearing in the minds of the jury on the question of conversion.

The Court told the jury the plaintiff was entitled to interest from the time of the conversion. The counsel says, in effect, the jury cannot allow interest because no conversion was proved.

This was the fact, yet the Court permits the case to go to the jury, thus virtually saying there was evidence before them of conversion.

The Court had not given them any instruction as to what constituted a conversion, as applicable to the case proved before them. They were left, therefore, with a very significant intimation from the Court that there was evidence which would authorize the jury to find a conversion.

This principle was applied by this Court in the case of Reynolds *v.* The People, decided at the March term.

The plaintiff in error was indicted for assault and battery with the intent to commit a rape. It appeared on the trial that there was really no force used, that the girl not only made no resistance to the indecent familiarities in which he indulged, but aided him therein. The Court was asked to instruct the

jury that there was no evidence of any intent to ravish, and there was none that an assault and battery had been committed.

The Court instructed the jury that they should not convict of the intent to commit the higher offence, but refused to instruct them that they should not convict of the lesser offence.

It was held that this was in effect an intimation equivalent to an instruction that there was evidence which would justify a conviction of assault and battery, and probably operated to induce the verdict. The conviction was for that cause reversed.

The judgment of the County Court is reversed, and a new trial ordered.

Judgment reversed.

Spence *v.* Union Marine Ins. Co., L. R. 3 C. P. 427.

IV.

BY WRONGFUL ACT.

If a person wilfully and wrongly intermingles his own with another's goods, so that they are indistinguishable, and they are of unequal value, the innocent party whose goods have thus been confused will have title to the whole mass.

BEACH *v.* SCHMULTZ.

Supreme Court of Illinois, 1856.

20 Ill. 186.

BREESE, J. Several questions are presented by this case, and the first is as to the affidavit made by Schmultz, the plaintiff below, on which to obtain a writ of replevin. It is in substance as the statute requires—it sufficiently describes the property, and has all the necessary averments.

The objections to the deposition of Oscar Gray are not tenable either as to his first or second deposition.

It is not true that a party has to apply for leave to the Court to retake a deposition. The statute does not require it, nor is

such the practice. A *dedimus protestatem* issues by the clerk, without any application to the Court, and a party might, if he choose to incur the expense, indulge a passion for taking the deposition of the same person more than twice, but the Court would take care as to which, and how many, should be read. It is purely discretionary with the Court, and is like recalling a witness, which the Court may or not allow.

As to the appointment of an elisor by the clerk to serve the writ of replevin, there can be no objection to that, as it is to be presumed there was no officer competent to serve it, the case showing that the writ of attachment on the cargo of lumber was in the hands of, and executed by, the coroner of the county, which could not legally be if there was a sheriff competent to act. We will intend the casus had arisen rendering it necessary for the purposes of immediate justice that an elisor should be appointed by the clerk.

The question of real moment in the case brings up the doctrine of confusion of goods, so far as the principal cargo is concerned, which the proof shows consisted of different kinds and qualities of lumber, of different grades—"of plank, boards and scantling," and some shingles. As to the lumber, Gray swears that he owned one-half and Schmultz the other half of the cargo, separately, and were so mixed together as that the several parts were incapable of identification. Besides this, some lumber was borrowed of others to make up the cargo, and the vessel ordered to Milwaukee, against the directions of Schmultz, that she should deliver her cargo at Chicago. There are circumstances in the case tending to show an intention, on the part of Gray, to dispose of the cargo at Milwaukee, and thus defraud Schmultz; and for this bad purpose, the several portions belonging to Schmultz and Gray, and that borrowed, were mixed up, without the knowledge or consent of Schmultz, so as to deprive him of his share, as it would appear.

The doctrine on this subject is thus stated by Blackstone, at page 405, Vol. 2, of his Commentaries. After treating of title to goods by accession, he says: "But in the case of confusion of goods, where those of two persons are so intermixed that the several portions can be no longer distinguished, the English law partly agrees with and partly differs from the civil. If the

intermixture be by consent, I apprehend that in both laws the proprietors have an interest in common, in proportion to their respective shares. But if one wilfully intermixes his money, corn, or hay with that of another man, without his approbation or knowledge, or casts gold, in like manner, into another's melting pot or crucible, the civil law, though it gives the sole property of the whole to him who has interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavored to be rendered uncertain, without his own consent."

This doctrine, as thus laid down, is not disputed anywhere in Courts where the common law is the rule of decision.

Gray, then, having wrongfully produced this confusion, by an unauthorized intermixture, necessarily forfeits his right to the whole, and the plaintiffs in error, his creditors, can have no right or claim to levy an attachment upon it. The Court could do no otherwise than to find for Schmultz, the defendant in error, that it was his property.

The case shows that shingles were a part of the cargo, and were Gray's separate property, and as they can be readily distinguished and separated, and as they belonged to Gray when shipped, it is contended they are yet his, and subject to the attachment. It is a sufficient answer to this to say that the facts show the whole cargo was consigned to Schmultz, and that he paid the freight on it. He, as consignee, had, therefore, a right to the possession of the shingles.

The merits of the case are wholly with the defendant in error, and the judgment of the Circuit Court is affirmed.

Judgment affirmed.

2 Blackstone, 405; 2 Kent, 365; 2 Schouler, P. P. § 47;
Cooley on Torts, 56;
Stevenson *v.* Little, 10 Mich. 433;
Jenkins *v.* Steanka, 19 Wis. 126;
Jewett *v.* Dringer, 30 N. J. Eq. 291;
Jewett *v.* Dringer, 30 N. J. Eq. 291;
Root *v.* Bonneman, 22 Wis. 539;
The Idaho, 93 U. S. 575;
Wooley *v.* Campbell, 8 Vroom. 169.

Query: If the owner of a tank of oil on a railroad car should wilfully empty a quart can of another's oil of unequal value therein, would the owner of the quart of oil thereby gain title to all in the tank?

But if the goods wrongfully intermingled were of EQUAL VALUE, the wrong-doer is still entitled to his share of the mixture *pro rata.*

HESSELTINE *v.* STOCKWELL.

Supreme Judicial Court of Maine, 1849.

30 Me. 237.

SHEPLEY, C. J. This was an action of trover brought to recover the value of certain pine logs.

The logs appear to have composed a part of a larger lot estimated to contain more than six hundred thousand feet, which were cut and hauled by Leander Preble. The case states that there was testimony tending to prove that Preble cut on his land about six hundred thousand feet of pine lumber, and also cut on the land of the plaintiff about one hundred thousand feet of pine lumber of a similar quality, all of which logs were marked with the same mark and hauled and landed on the same landing-place.

With other instructions the jury were instructed "that it did not appear that any question of confusion of property arose in the action."

What will constitute a confusion of goods has been the subject of much discussion, and it has become a question of much interest to the owners of lands upon which there are timber trees, as well as to those persons interested in the lumbering business, whether the doctrine can be applicable to the intermixture of logs.

When there has been such an intermixture of goods owned by different persons that the property of each can no longer be distinguished, what is denominated a confusion of goods has taken place. And this may take place with respect to mill logs and other lumber. But it can do so only upon proof that the property of each can no longer be distinguished. That the doctrine might be applicable to mill logs is admitted in the

case of Loomis *v.* Green, 7 Greenl. 393. The case of Wingate *v.* Smith, 20 Maine, 287, has been alluded to as exhibiting a different doctrine; but the case does not authorize such a conclusion. The instructions were, "that merely taking the mill-logs and fraudulently mixing them with the defendant's logs would not constitute confusion of goods." These instructions were and clearly must have been approved; for an additional element was required that the mixture should have been of such a character that the property of each could no longer be distinguished. The opinion merely refers with approbation to the case of Ryder *v.* Hathaway, 21 Pick. 298, and says, "the principles there stated would authorize the instructions which were given on that point in this case."

The common law, in opposition to the civil law, assigns the whole property, without liability to account for any part of it, to the innocent party when there has been a confusion of goods, except in certain cases or conditions of property. Chancellor Kent correctly observes that the rule is carried no further than necessity requires: 2 Kent's Com. 365.

There is therefore no forfeiture of the goods of one who voluntarily and without fraud makes such an admixture. As when, for example, he supposes all the goods to be his own, or when he does it by mistake.

And there is no forfeiture in case of a fraudulent intermixture when the goods intermixed are of equal value. This has not been of sufficient notice, and yet it is a just rule, and is fully sustained by authority. Lord Eldon, in the case of Lupton *v.* White, 15 Ves. 442, states the law of the old decided cases to be, "if one man mixes his corn or flour with that of another and they were of equal value, the latter must have the given quantity; but if articles of a different value are mixed, producing a third value, the aggregate of the whole, and through the fault of the person mixing them, the other party cannot tell what was the original value of his property, he must have the whole." This doctrine is stated with approbation by Kent: 2 Kent's Com. 365. It is again stated in the case of Ryder *v.* Hathaway. The opinion says, "if they were of equal value, as corn or wood of the same kind, the rule of justice would be obvious. Let each one take his own given quantity.

But if they were of unequal value, the rule would be more difficult."

In the case of Willard *v.* Rice, 11 Metc. 493, the question whether palm-leaf hats, which were intermixed, were of equal value, does not appear to have been, although it would seem that it might have been made. The case is not therefore opposed to the doctrine here stated. The doctrine is noticed, in the cases of Hart *v.* Ten Eyck, 2 Johns, Ch. 62; Ringgold *v.* Ringgold, 1 Har. and Gill. 11; Brackenridge *v.* Holland, 2 Blackf. 377.

If no logs were cut upon land owned by the plaintiff, no question could have arisen of confusion of goods. The jury were required by the instructions to find only, that none of those taken by the defendant were cut on the plaintiff's land. They were not required to find that no logs, composing the whole lot of six or seven hundred thousand feet, were cut on the plaintiff's land.

If Preble wrongfully cut any logs on land owned by the plaintiff, and mixed them with logs cut on his own land, so that they could not be distinguished, a question respecting confusion of goods might properly have arisen. The admixture might have been of such a character that the whole lot of logs, including those in the possession of the defendant, might have become the property of the plaintiff. Or it might have been of such a character, the logs being of equal value, that the plaintiff would have been entitled to recover from any one in possession of those logs or of a part of them, such proportion of them, as the logs cut upon his land bore to the whole number.

While the facts reported might not necessarily prove a confusion of goods, if part of the whole lot of logs were cut upon land owned by the plaintiff, they might have been sufficient to raise that question, and to present it for the consideration of the jury.

The instructions therefore, when considered together, requiring the plaintiff to satisfy the jury, that some of that particular portion of the whole lot of logs which the defendant had in his possession were cut upon land owned by the plaintiff, and that no question of confusion of property appeared to arise,

were too restrictive. They may have deprived the plaintiff of the right to recover upon proof that some of the logs composing the whole lot had been cut upon his land, and so mixed with logs cut on land owned by Preble that they could not be distinguished.

Exceptions sustained, verdict set aside, and new trial granted.

2 Kent, 363;
Lupton *v.* White, 15 Ves. Eq. 442;
Ryder *v.* Hathaway, 21 Pick. 298;
Hart *v.* Ten Eyck, 2 John. Ch. 62–108;
Brackenridge *v.* Holland, 2 Blackf. 277;
Goodenow *v.* Snyder, 3 Green, 599;
Schulenberg *v.* Harriman, 21 Wall. 44;
Chandler *v.* DeGraff, 25 Minn. 88;
Smith *v.* Morrill, 56 Me. 566.

INVENTIONS.

An inventor has property rights in the products of his inventive genius when they are properly patented.

SHAW *v.* COOPER.

Supreme Court of United States, 1833.

7 Peters, 292.

Mr. Justice M'LEAN delivered the opinion of the Court.

This writ of error brings before this Court, for its revision, a judgment of the Circuit Court of the United States for the Southern District of New York.

An action was brought in the Circuit Court by Shaw against the defendant Cooper, for the violation of a certain patent right claimed by the plaintiff. The defendant pleaded the general issue, and gave notice that on the trial he would prove "that the pretended new and useful improvement in guns and firearms, mentioned and referred to in the several counts in the declaration; also that the said pretended new and useful improvement, or the essential parts or portions thereof, or some or one of them, had been known and used in this country, viz. in the city of New York and in the city of Philadelphia, and in sundry other places in the United States, and in England, in France, and in other foreign countries, before the plaintiff's application for a patent as set forth in his declaration," &c.

On the trial, the following bill of exceptions was taken: "to maintain the issue joined, the plaintiff gave in evidence certain letters patent of the United States, as set forth in the declaration, issued on the 7th day of May, 1829; and also that the improvement for which the letters were granted was invented or discovered by the plaintiff in 1813 or 1814; and that the defendant had sold instruments which were infringements of the said letters patent.

"And the defendant then proved, by the testimony of one witness, that he had used the said improvement in England, and had purchased a gun of the kind there, and had seen others use the said improvement, and had seen guns of the kind in the Duke of York's armory in 1819. And also proved by the testimony of five other witnesses that in 1820 and 1821 they worked in England at the business of making and repairing guns, and that the said improvement was generally used in England in those years; but that they had never seen guns of the kind prior to those years; and also proved that in the year 1821 it was used and known in France; and also that the said improvement was generally known and used in the United States after the 19th day of June, 1822.

"And the plaintiff, further to maintain the issue on his part, then gave in evidence that he not being a worker in iron in 1813 or 1814, employed his brother in England, under strict injunctions of secrecy, to execute or fabricate the said improvement for the purpose of making experiments. And that the plaintiff afterwards, in 1817, left England and came to reside in the United States; and that after his departure from England, in 1817 or 1818, his said brother divulged the secret for a certain reward to an eminent gun-maker in London. That on the arrival of the plaintiff in this country, in 1817, he disclosed his said improvement to a gun-maker, whom he consulted as to obtaining a patent for the same, and whom he wished to engage to join and assist him. That the plaintiff made this disclosure under injunctions of secrecy, claiming the improvement as his own, declaring that he should patent it. That the plaintiff treated his invention as a secret after his arrival in this country, often declaring that he should patent it; and that this step was only delayed that he might make it more perfect before it was introduced into public use; and that he did make alterations which some witnesses considered improvements in his invention, and others did not. That in this country the invention was never known nor used prior to the said 19th day of June, 1822; that on that day letters patent were issued to the plaintiff, being then an alien, and that he immediately brought his invention into public use. That afterwards, and after suits had been brought for a violation of the said letters patent, the

plaintiff was advised to surrender them on account of the specification being defective; and that he did accordingly, on the 7th day of May in the year 1829, surrender the same into the Department of the Secretary of State, and received the letters first above named.

"And the plaintiff also gave in evidence that prior to the 19th day of June, 1822, the principal importers of guns from England in New York and Philadelphia, at the latter of which cities the plaintiff resided, had never heard anything of the said invention, or that the same was used or known in England; and that no guns of the kind were imported into this country until in the years 1824 or 1825. And that letters patent were granted in England on the 11th day of April, 1807, to one Alexander J. Forsyth, for a method of discharging or giving fire to artillery and all other firearms; which method he describes in his specification as consisting in the 'use or application as a priming, in any mode, of some or one of those chemical compounds which are so easily inflammable as to be capable of taking fire and exploding without any actual fire being applied thereto, and merely by a blow, or by any sudden or strong pressure or friction given or applied thereto, without extraordinary violence; that is to say, some one of the compounds of combustible matter, such as sulphur or sulphur and charcoal, with an oxmuriatic salt; for example, the salt formed of dephlogisticated marine acid and potash (or potasse), which salt is otherwise called oxmuriate of potash; or such of the fulminating metallic compounds as may be used with safety; for example, fulminating mercury, or of common gunpowder mixed in due quantity with any of the above mentioned substances, or with any oxmuriatic salt, as aforesaid, or of suitable mixtures of any of the before mentioned compounds;' and that the said letters patent continued in force for the period of fourteen years from the time of granting the same.

"And the defendant, further to maintain the issue on his part, gave in evidence a certain letter from the plaintiff to the defendant, dated in December in the year 1824, from which the following is an extract: 'Some time since I stated that I had employed counsel respecting regular prosecutions for any trespass against my rights to the patent; I have at length obtained

the opinion of Mr. Sergeant of this city, together with others eminent in the law, and that is, that I ought (with a view to insure success) to visit England, and procure the affidavits of Manton and others to whom I made my invention known, and also of the person whom I employed to make the lock at the time of invention; for it appears very essential that I should prove that I did actually reduce the principle to practice, otherwise a verdict might be doubtful. It is, therefore, my intention to visit England in next May for this purpose; in the meantime proceedings which have commenced here are suspended for the necessary time.'"

And the Court, on these facts, charged the jury that the patent of the 7th of May, 1829, having been issued, as appears by its recital, on the surrender and cancelment of the patent of the 19th day of June in the year 1822; and being intended to correct a mistake or remedy a defect in the latter; it must be considered as a continuation of the said patent, and the rights of the plaintiff were to be determined by the state of things which existed in the year 1822, when the patent was first obtained.

That the plaintiff's case, therefore, came under the Act passed the 17th day of April, 1800, extending the right of obtaining patents to aliens; by the first section of which the applicant is required to make oath that his invention has not, to the best of his knowledge or belief, been known or used in this or any foreign country. That the plaintiff most probably did not know, in the year 1822, that the invention for which he was taking out a patent had, before that time, been in use in a foreign country; but that his knowledge or ignorance on that subject was rendered immaterial by the concluding part of the section, which expressly declares that every patent obtained pursuant to that Act, for any invention which it should afterward appear had been known or used previous to such application for a patent, should be utterly void. That there was nothing in the Act confining such use to the United States; and that if the invention was previously known in England or France it was sufficient to avoid the patent under that Act. That the evidence would lead to the conclusion that the plaintiff was the inventor in this case, but the Court were of opinion that he

had slept too long on his rights, and not followed them up as the law requires to entitle him to any benefit from his patent. That the use of the invention, by a person who had pirated it, or by others who knew of the piracy, would not affect the inventor's rights, but that the law was made for the benefit of the public as well as of the inventor; and if, as appears from the evidence in this case, the public had fairly become possessed of the invention before the plaintiff applied for his patent, it was sufficient, in the opinion of the Court, to invalidate the patent; even though the invention may have originally got into public use through the fraud or misconduct of his brother, to whom he entrusted the knowledge of it.

Under this charge the jury found a verdict for the defendant, on which a judgment was entered.

There is a general assignment of errors, which brings to the consideration of the Court the principles of law which arise out of the facts of the case, as stated in the bill of exceptions.

It may be proper in the first place to inquire whether the letters patent which were obtained in 1829, on a surrender of the first patent, have relation to the emanation of the patent in 1822, or shall be considered as having been issued on an original application.

On the part of the plaintiff it is contended that "the second patent is original and independent, and not a continuation of the first patent." That in adopting the policy of giving, for a term of years, exclusive rights to inventors in this country, we adopted at the same time the rules of the common law as applied to patents in England: and that by the common law a patent when defective may be surrendered to the granting power, which vacates the right under it, and the king may grant the right *de novo* either to the same or to any other person.

This being the effect of the surrender of a patent in England, it is insisted that the same consequence should follow a surrender in this country. On this subject it is said, that the decisions of the English Courts are uniform, and that not even a *dictum* can be found that a second patent is a continuation of the first.

The counsel seems to consider this point of great importance, as the plaintiff was an alien when the first patent was obtained,

but had become naturalized before the date of the second; and, consequently, that his rights under the second patent cannot be governed by the law applicable to aliens. As the inquiry on this head is, whether the second patent has relation to the first, it is not necessary to look into the laws to ascertain the respective rights of aliens and citizens on this subject. In regard to the rights of the patentee to surrender a defective patent, and take out a new one; there can be no difference between a citizen and an alien.

That the holder of a defective patent may surrender it to the Department of State, and obtain a new one, which shall have relation to the emanation of the first, was decided by this Court at the last term in the case of Grant and others *v.* Raymond, 6 Peters, 220. The Chief Justice, in giving the opinion of the Court, says: "But the new patent, and the proceedings on which it issues, have relation to the original transaction. The time of the privilege still runs from the date of the original patent. The application may be considered as appended to the original application; and if the new patent is valid, the law must be considered as satisfied if the machine was not known or used before that application."

As this decision must be considered as settling the construction of the patent laws on this point, it is conclusive in the present case; and it is, therefore, unnecessary to examine the argument of the plaintiff's counsel, which was designed to lead to a different conclusion.

The second patent being a continuation of the first one, the rights of the plaintiff must be ascertained by the law under which the original application was made.

This law was passed on the 17th of April, 1800, and provides "that all and singular the rights and privileges given to citizens of the United States respecting patents for new inventions, etc., shall be extended to aliens, who, at the time of petitioning, shall have resided for two years within the United States, etc. Provided, that every person petitioning for a patent for any invention, art, or discovery, pursuant to this Act, shall make oath or affirmation before some person duly authorized to administer oaths, before such patent shall be granted, that such invention, art, or discovery hath not to the

best of his or her knowledge or belief been known or used, either in this or any foreign country; and that every patent which shall be obtained pursuant to this Act for any invention, art, or discovery which it shall afterwards appear had been known or used previous to such application for a patent, shall be utterly void."

By the Act of the 21st of February, 1793, which limits patent rights to citizens, it is provided "that every person or persons, in his or their application for a patent, shall state that the machine, etc., was *not known or used* before such application."

The sixth section of this Act provides that a defendant, when prosecuted for a violation of a patent right, may give in evidence, under a notice, among other matters, "that the thing secured by patent was not originally discovered by the patentee, but had been in use, or had been described in some public work anterior to the supposed discovery of the patentee, or that he had surreptitiously obtained a patent for the discovery of another person: in either of which cases judgment shall be rendered for the defendant with costs, and the patent shall be declared void."

It would seem, from the above provisions, that citizens and aliens, as to patent rights, are placed substantially upon the same ground. In either case, if the invention was known or used by the public before it was patented, the patent is void. In both cases the right must be tested by the same rule.

From the facts in the case, it appears that the plaintiff, while residing in England, in 1813 or 1814, invented the instrument secured by his patent. That before he came to the United States, he made known his invention to his brother, to Mr. Manton, a gun-maker in London, and to others. That shortly after he came to the United States, in 1817, he disclosed his invention to a gun-maker in Philadelphia, and that in 1817 or 1818, the plaintiff's brother sold the invention to a gun-maker in London. That in 1819 the invention was sold and used in England; and that in the two following years it was in public use there, and in the latter year also in France. That on the 19th of June, 1822, his first patent was obtained.

It also appears that in April, 1807, a patent was granted in England to one Forsyth for fourteen years, for an invention on

the same subject. This fact was shown by the plaintiff, it is presumed, as a reason why he did not take out a patent in England.

The question arises from these facts, and others which belong to the case, whether there was such a use in the public, of this invention, at the date of the plaintiff's first patent, as to render it void.

By the plaintiff's counsel it is insisted that if an invention has been pirated, or fraudulently divulged, the inventor cannot thereby lose his right to his own invention and property; and it makes no difference that the public have acquired the use of the invention without any participation in the fraud, unless the inventor has acquiesced in such use.

The right of the plaintiff to his invention, is compared to his right to other property, which cannot be divested by fraud or violence; and the case of Miller *v.* Taylor, 4 Burr. 2303, where seven judges against four held, that at common law, an author, by publishing a literary composition, does not abandon his right, is referred to as illustrative of the priuciple.

Several decisions by the Circuit Courts of the United States are cited to sustain the right of the plaintiff. In the case of Whittemore *v.* Cutter, 1 Gall. 482, the Court say, "it will not protect the plaintiff's patent, that he was the inventor of the improvements, if he suffered them to be used freely and fully by the public at large for so many years, combined with all the usual machinery; for in such case he must be deemed to have made a gift of them to the public, as much as a person who voluntarily opens his land as a highway, and suffers it to remain for a length of time devoted to public use."

In the case of Goodyear *v.* Matthews, 1 Paine's Rep. 301, the Court, in substance, say, "that if the plaintiff be the inventor, it is immaterial that the invention has been known and used for years before the application." And in the case of Morris *v.* Huntington, 1 Paine, 354, the Court say, that "no man is to be permitted to lie by for years, and then take out a patent. If he has been practising his invention with a view of improving it, and thereby rendering it a greater benefit to the public, before taking out a patent, that ought not to prejudice him. But it should always be a question submitted to the jury,

what was the intent of the delay of the patent, and whether the allowing the invention to be used without a patent should not be considered an abandonment or present of it to the public."

This was a case where a second patent had been obtained, the first being defective, and this, it would seem, was deemed sufficient to protect the right of the plaintiff, though the public had been in possession of the invention for six years before the emanation of the second patent.

Of the same import are the cases cited from 4 Mason, 108; and 4 Washington, 438 and 703.

The question what use in the public before the application is made for a patent shall make void the right of the patentee, was brought before this Court by the case of Pennock and Sellers *v.* Dialogue, reported in 2 Peters, 1. In this case the Court say that "it has not been, and indeed cannot be denied, that an inventor may abandon his invention and surrender or dedicate it to the public. This inchoate right, thus gone, cannot afterwards be resumed at his pleasure; for when gifts are once made to the public in this way, they become absolute." And again, "if an invention is used by the public, with the consent of the inventor, at the time of his application for a patent; how can the Court say, that his case is nevertheless such as the act was intended to protect? If such a public use is not a use within the meaning of the statute; how can the Court extract the case from its operation, and support a patent, when the suggestions of the patentee were not true; and the conditions, on which alone the grant was authorized, do not exist."

"The true construction of the patent law is," the Court say, "that the first inventor cannot acquire a good title to a patent, if he suffers the thing invented to go into public use, or to be publicly sold for use before he makes application for a patent."

In this case it appeared that the thing invented had been in use by the public, with the consent of the inventors, and through which they derived a profit, for seven years before the emanation of a patent. And this use was held by the Court to be an abandonment of the right by the patentees.

The policy of granting exclusive privileges in certain cases,

was deemed of so much importance in a national point of view, that power was given to Congress in the Federal Constitution, "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

This power was exercised by Congress, in the passage of the acts which have been referred to. And from an examination of their various provisions, it clearly appears, that it was the intention of the legislature, by a compliance with the requisites of the law, to vest the exclusive right in the inventor only; and that on condition, that his invention was neither known or used by the public, before his application for a patent. If such use or knowledge shall be proved to have existed, prior to the application for the patent, the Act of 1793 declares the patent void; and as has been already stated, the right of an alien is vacated in the same manner, by proving a foreign use or knowledge of his invention. That knowledge or use which would be fatal to the patent right of a citizen, would be equally so to the right of an alien.

The knowledge or use spoken of in the Act of 1793 could have referred to the public only, for the provision would be nugatory if it were applied to the inventor himself. He must, necessarily, have a perfect knowledge of the thing invented and its use, before he can describe it, as by law he is required to do, preparatory to the emanation of a patent. But there may be cases in which a knowledge of the invention may be surreptitiously obtained and communicated to the public, that do not affect the right of the inventor. Under such circumstances no presumption can arise in favor of an abandonment of the right to the public, by the inventor; though an acquiescence on his part, will lay the foundation for such a presumption.

In England it has been decided that if an inventor shall suffer the thing invented to be sold, and go into public use for four months; and in a later case for any period of time, before the date of his patent; it is utterly void.

In that country the right emanates from the royal prerogative; in this, it is founded exclusively on statutory provisions. But the policy in both governments is the same, in granting the right, and in fixing its limits.

Vigilance is necessary to entitle an individual to the privileges secured under the patent law. It is not enough that he should show his right by invention, but he must secure it in the mode required by law. And if the invention, through fraudulent means, shall be made known to the public, he should assert his right immediately, and take the necessary steps to legalize it.

The patent law was designed for the public benefit, as well as for the benefit of inventors. For a valuable invention, the public, on the inventor's complying with certain conditions, give him, for a limited period, the profits arising from the sale of the thing invented. This holds out an inducement for the exercise of genius and skill in making discoveries which may be useful to society, and profitable to the discoverer. But it was not the intention of this law to take from the public that of which they were fairly in possession.

In the progress of society, the range of discoveries in the mechanic arts, in science, and in all things which promote the public convenience, as a matter of course, will be enlarged. This results from the aggregation of mind, and the diversity of talents and pursuits, which exist in every intelligent community. And it would be extremely impolitic to retard or embarrass this advance, by withdrawing from the public any useful invention or art, and making it a subject of private monopoly. Against this consequence, the legislature have carefully guarded in the laws they have passed on the subject.

It is undoubtedly just that every discoverer should realize the benefits resulting from his discovery for the period contemplated by law. But these can only be secured by a substantial compliance with every legal requisite. His exclusive right does not rest alone upon his discovery; but also upon the legal sanctions which have been given to it, and the forms of law with which it has been clothed.

No matter by what means an invention may be communicated to the public, before a patent is obtained, any acquiescence in the public use, by the inventor, will be an abandonment of his right. If the right were asserted by him who fraudulently obtained it, perhaps no lapse of time could give it

validity. But the public stand in an entirely different relation to the inventor.

The invention passes into the possession of innocent persons, who have no knowledge of the fraud, and at a considerable expense, perhaps, they appropriate it to their own use. The inventor or his agent has full knowledge of these facts, but fails to assert his right: shall he afterwards be permitted to assert it with effect? Is not this such evidence of acquiescence in the public use, on his part, as justly forfeits his right?

If an individual witness a sale and transfer of real estate, under certain circumstances, in which he has an equitable lien or interest, and does not make known this interest, he shall not afterwards be permitted to assert it. On this principle it is, that a discoverer abandons his right, if, before the obtainment of his patent, his discovery goes into public use. His right would be secured by giving public notice that he was the inventor of the thing used, and that he should apply for a patent. Does this impose anything more than reasonable diligence on the inventor? And would anything short of this be just to the public?

The acquiescence of an inventor in the public use of his invention can in no case be presumed where he has no knowledge of such use. But this knowledge may be presumed from the circumstances of the case. This will, in general, be a fact for the jury. And if the inventor do not, immediately after this notice, assert his right, it is such evidence of acquiescence in the public use as forever afterwards to prevent him from asserting it. After his right shall be perfected by a patent, no presumption arises against it from a subsequent use by the public.

When an inventor applies to the Department of State for a patent, he should state the facts truly; and indeed he is required to do so, under the solemn obligations of an oath. If his invention has been carried into public use by fraud; but for a series of months or years, he has taken no steps to assert his right; would not this afford such evidence of acquiescence as to defeat his application, as effectually, as if he failed to state that he was the original inventor? And the same evi-

dence which should defeat his application for a patent, would, at any subsequent period, be fatal to his right. The evidence he exhibits to the Department of State is not only *ex parte*, but interested; and the questions of fact are left open, to be controverted by any one who shall think proper to contest the right under the patent.

A strict construction of the act, as it regards the public use of an invention, before it is patented, is not only required by its letter and spirit, but also by sound policy. A term of fourteen years was deemed sufficient for the enjoyment of an exclusive right of an invention by the inventor; but if he may delay an application for his patent, at pleasure, although his invention be carried into public use, he may extend the period beyond what the law intended to give him. A pretence of fraud would afford no adequate security to the public in this respect, as artifice might be used to cover the transaction. The doctrine of presumed acquiescence, where the public use is known, or might be known to the inventor, is the only safe rule which can be adopted on this subject.

In the case under consideration it appears the plaintiff came to this country, from England, in the year 1817, and being an alien, he could not apply for a patent until he had remained in the country two years. There was no legal obstruction to his obtaining a patent in the year 1819; but it seems that he failed to apply for one, until three years after he might have done so. Had he used proper diligence in this respect his right might have been secured; as his invention was not sold in England until the year 1819. But, in the two following years, it is proved to have been in public use there, and in the latter year, also in France.

Under such circumstances, can the plaintiff's right be sustained?

His counsel assigns as a reason for not making an earlier application, that he was endeavoring to make his invention more perfect; but it seems by this delay, he was not enabled, essentially, to vary or improve it. The plan is substantially the same as was carried into public use through the brother of the plaintiff, in England. Such an excuse, therefore, cannot avail the plaintiff. For three years, before the emanation of

his patent, his invention was in public use, and he appears to have taken no step to assert his right. Indeed he sets up, as a part of his case, the patent to Forsythe, as a reason why he did not apply for a patent in England.

The Forsythe patent was dead six years before. Some of the decisions of the circuit courts, which are referred to, were overruled in the case of Pennock and Sellers *v.* Dialogue. They made the question of abandonment to turn upon the intention of the inventor. But such is not considered to be the true ground. Whatever may be the intention of the inventor, if he suffers his invention to go into public use, through any means whatsoever, without an immediate assertion of his right, he is not entitled to a patent, nor will a patent, obtained under such circumstances, protect his right.

The judgment of the Circuit Court must be affirmed with costs.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the southern district of New York, and was argued by counsel; on consideration whereof, it is adjudged and ordered by this court, that the judgment of the said circuit court in this cause, be and the same is hereby affirmed with costs.

DARLINGTON, P. P. p. 192;
1 Schouler, P. P. § 518;
2 Schouler, P. P. § 28;
Blanchard *v.* Sprague, 3 Sumner, 535;
Kendall *v.* Winsor, 21 How. 322;
Grant *v.* Raymond, 6 Peters, 218;
See appendix to 3 Wheaton, note 2;
Robinson on Patents, vol. 1, §§ 24-44.

LITERARY COMPOSITION.

An author in this country has an exclusive property in his published works if duly copyrighted, and at common law he had an absolute property in his works before their publication.

WHEATON *v.* PETERS.

Supreme Court of United States, 1834.

8 Peters, 591.

The complainants claimed to have a copyright in and to the twelve volumes of Wheaton's Reports, and they alleged that defendant had violated their rights by printing and publishing the same in a series which defendants had prepared, entitled "Condensed Reports of Cases in the Supreme Court of the U. S.," and prayed among other things that defendants be restrained from further publication thereof.

Mr. Justice M'LEAN delivered the opinion of the Court.

After stating the case, he proceeded:

Some of the questions which arise in this case are as novel, in this country, as they are interesting. But one case involving similar principles, except a decision by a State Court, has occurred, and that was decided by the Circuit Court of the United States for the district of Pennsylvania, from whose decree no appeal was taken.

The right of the complainants must be first examined. If this right shall be sustained as set forth in the bill, and the defendants shall be proved to have violated it, the Court will be bound to give the appropriate redress.

The complainants assert their right on two grounds.

First, under the common law.

Secondly, under the Acts of Congress.

And they insist, in the first place, that an author was entitled, at common law, to a perpetual property in the copy of his

works, and in the profits of their publication; and to recover damages for its injury, by an action on the case, and to the protection of a Court of Equity.

In support of this proposition, the counsel for the complainants have indulged in a wide range of argument, and have shown great industry and ability. The limited time allowed for the preparation of this opinion will not admit of an equally extended consideration of the subject by the Court.

Perhaps no topic in England has excited more discussion, among literary and talented men, than that of the literary property of authors. So engrossing was the subject, for a long time, as to leave few neutrals among those who were distinguished for their learning and ability. At length the question, whether the copy of a book or literary composition belongs to the author at common law was brought before the Court of King's Bench, in the great case of Miller *v.* Taylor, reported in 4 Burr. 2303. This was a case of great expectation; and the four Judges, in giving their opinions, seriatim, exhausted the argument on both sides. Two of the Judges and Lord Mansfield held that by the common law an author had a literary property in his works; and they sustained their opinion with very great ability. Mr. Justice Yeates, in an opinion of great length, and with an ability, if equalled, certainly not surpassed, maintained the opposite ground.

Previous to this case, injunctions had issued out of chancery to prevent the publication of certain works at the instance of those who claimed a property in the copyright, but no decision had been given. And a case had been commenced at law between Tonson and Collins, on the same ground, and was argued with great ability more than once, and the Court of King's Bench were about to take the opinion of all the Judges, when they discovered that the suit had been brought by collusion, to try the question, and it was dismissed.

This question was brought before the House of Lords in the case of Donaldson *v.* Beckett and others, reported in 4 Burr. 2408.

Lord Mansfield, being a peer, through feelings of delicacy, declined giving any opinion. The eleven Judges gave their opinions on the following points: 1st. Whether at common law

an author of any book or literary composition had the sole right of first printing, and publishing the same for sale; and might bring an action against any person who printed, published, and sold the same without his consent. On this question there were eight Judges in the affirmative and three in the negative.

2d. If the author had such right originally, did the law take it away upon his printing and publishing such book or literary composition? and might any person, afterward, reprint and sell, for his own benefit, such book or literary composition, against the will of the author? This question was answered in the affirmative by four Judges and in the negative by seven.

3d. If such action would have lain at common law, is it taken away by the Statute of 8 Anne; and is an author, by the said statute, precluded from every remedy, except on the foundation of the said statute, and on the terms of the conditions prescribed thereby? Six of the Judges, to five, decided that the remedy must be under the statute.

4th. Whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity by the common law. Which question was decided in favor of the author by seven Judges to four.

5th. Whether this right is in any way impeached, restrained, or taken away by the Statute 8 Anne? Six to five Judges decided that the right is taken away by the statute. And the Lord Chancellor, seconding Lord Camden's motion to reverse, the decree was reversed.

It would appear from the points decided, that a majority of the Judges were in favor of the common law right of authors, but that the same had been taken away by the statute.

The title and preamble of the Statute 8 Anne, ch. 19, is as follows: "An Act for the encouragement of learning by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.

"Whereas printers, booksellers, and other persons, have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings without the consent of the authors or proprietors of such books and writings, to their very great

detriment, and too often to the ruin of them and their families," &c.

In 7 Term Rep. 627, Lord Kenyon says, "all arguments in the support of the rights of learned men in their works, must ever be heard with great favor by men of liberal minds to whom they are addressed. It was probably on that account that when the great question of literary property was discussed, some Judges of enlightened understanding went the length of maintaining that the right of publication rested exclusively in the authors and those who claimed under them for all time; but the other opinion finally prevailed, which established that the right was confined to the times limited by the Act of Parliament. And that, I have no doubt, was the right decision."

And in the case of the University of Cambridge *v.* Pryor, 16 East, 319, Lord Ellenborough remarked, "it has been said that the Statute of 8 Anne has three objects; but I cannot subdivide the two first; I think it has only two. The counsel for the plaintiffs contended that there was no right at common law and perhaps there might not be; but of that we have not particularly anything to do."

From the above authorities, and others which might be referred to if time permitted, the law appears to be well settled in England that since the Statute of 8 Anne the literary property of an author in his works can only be asserted under the statute, and that notwithstanding the opinion of a majority of the Judges in the great case of Miller *v.* Taylor, was in favor of the common law right before the statute, it is still considered in England as a question by no means free from doubt.

That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavors to realize a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.

The argument that a literary man is as much entitled to the product of his labor as any other member of society, cannot be controverted. And the answer is, that he realizes this product

by the transfer of his manuscripts, or in the sale of his works when first published.

A book is valuable on account of the matter it contains, the ideas it communicates, the instruction or entertainment it affords. Does the author hold a perpetual property in these? Is there an implied contract by every purchaser of his book, that he may realize whatever instruction or entertainment which the reading of it shall give, but shall not write out or print its contents?

In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine? In the production of this, his mind has been as intensely engaged, as long and perhaps as usefully to the public as any distinguished author in the composition of his book.

The result of their labors may be equally beneficial to society, and in their respective spheres they may be alike distinguished for mental vigor. Does the common law give a perpetual right to the author, and withhold it from the inventor? And yet it has never been pretended that the latter could hold, by the common law, any property in his invention after he shall have sold it publicly.

It would seem, therefore, that the existence of a principle may well be doubted, which operates so unequally. This is not a characteristic of the common law. It is said to be founded on principles of justice, and that all its rules must conform to sound reason.

Does not the man who imitates the machine profit as much by the labor of another as he who imitates or republishes a book? Can there be a difference between the types and press with which one is formed, and the instruments used in the construction of the others?

That every man is entitled to the fruits of his own labor must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property, which regulate society, and which define the rights of things in general.

But, if the common law right of authors were shown to exist in England, does the same right exist, and to the same extent, in this country?

It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs, and common law. There is no principle which pervades the Union and has the authority of law that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption.

When, therefore, a common law right is asserted, we must look to the State in which the controversy originated. And in the case under consideration, as the copyright was entered in the clerk's office of the District Court of Pennsylvania, for the first volume of the book in controversy, and it was published in that State; we may inquire whether the common law as to copyrights, if any existed, was adopted in Pennsylvania.

It is insisted that our ancestors, when they emigrated to this country, brought with them the English common law as a part of their heritage.

That this was the case to a limited extent is admitted. No one will contend that the common law, as it existed in England, has ever been in force in all its provisions in any State in this Union. It was adopted so far only as its principles were suited to the condition of the colonies; and from this circumstance we see what is common law in one State is not so considered in another. The judicial decisions, the usages and customs of the respective States must determine how far the common law has been introduced and sanctioned in each.

In the argument, it was insisted that no presumption could be drawn against the existence of the common law as to copyrights, in Pennsylvania, from the fact of its never having been asserted until the commencement of this suit.

It may be true, in general, that the failure to assert any particular right may afford no evidence of the non-existence of such right. But the present case may well form an exception to this rule.

If the common law, in all its provisions, has not been introduced into Pennsylvania, to what extent has it been adopted? Must not this Court have some evidence on this subject? If no right, such as is set up by the complainants, has heretofore been

asserted, no custom or usage established, no judicial decision been given, can the conclusion be justified that by the common law of Pennsylvania, an author has a perpetual property in the copyright of his works?

These considerations might well lead the Court to doubt the existence of this law in Pennsylvania; but there are others of a more conclusive character.

The question respecting the literary property of authors was not made a subject of judicial investigation in England until 1760; and no decision was given until the case of Miller *v.* Taylor was decided in 1769. Long before this time the colony of Pennsylvania was settled. What part of the common law did Penn and his associates bring with them from England?

The literary property of authors, as now asserted, was then unknown in that country. Laws had been passed regulating the publication of new works under license. And the king, as the head of the church and the State, claimed the exclusive right of publishing the Acts of parliament, the book of common prayer, and a few other books.

No such right at the common law had been recognized in England when the colony of Penn was organized. Long afterwards, literary property became a subject of controversy, but the question was involved in great doubt and perplexity; and a little more than a century ago, it was decided by the highest judicial Court in England that the right of authors could not be asserted at common law, but under the statute. The Statute of 8 Anne was passed in 1710.

Can it be contended that this common law right, so involved in doubt as to divide the most learned jurists of England, at a period in her history as much distinguished by learning and talents as any other, was brought into the wilds of Pennsylvania by its first adventurers? Was it suited to their condition?

But there is another view still more conclusive.

In the eighth section of the first article of the Constitution of the United States, it is declared that Congress shall have power "to promote the progress of science and useful arts by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries." And in pursu-

ance of the power thus delegated, Congress passed the Act of the 30th of May, 1790.

This is entitled "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned."

In the first section of this Act it is provided, "that from and after its passage, the author and authors of any map, chart, book or books, already printed within these United States, being a citizen, etc., who hath or have not transferred to any other person the copyright of such map, chart, book or books, etc., shall have the sole right and liberty of printing, reprinting, publishing and vending such map, book or books, for fourteen years."

In behalf of the common law right an argument has been drawn from the word *secure*, which is used in relation to this right both in the Constitution and in the Acts of Congress. This word, when used as a verb active, signifies to protect, insure, save, ascertain, etc.

The counsel for the complainants insist that the term, as used, clearly indicates an intention not to originate a right, but to protect one already in existence.

There is no mode by which the meaning affixed to any word or sentence, by a deliberative body, can be so well ascertained, as by comparing it with the words and sentences with which it stands connected. By this rule the word *secure*, as used in the Constitution, could not mean the protection of an acknowledged legal right. It refers to inventors as well as authors, and it has never been pretended by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented.

And, if the word *secure* is used in the Constitution in reference to a future right, was it not so used in the Act of Congress?

But, it is said, that part of the first section of the Act of Congress, which has been quoted, a copyright is not only recognized as existing, but that it may be assigned, as the rights of the assignee are protected, the same as those of the author.

As before stated, an author has, by the common law, a property in his manuscript; and there can be no doubt that the

rights of an assignee of such manuscript would be protected by a Court of Chancery. This is presumed to be the copyright recognized in the Act, and which was intended to be protected by its provisions. And this protection was given, as well to books published under such circumstances, as to manuscript copies.

That Congress, in passing the Act of 1790, did not legislate in reference to existing rights appears clear from the provision that the author, etc., "shall have the sole right and liberty of printing," etc. Now, if this exclusive right existed at common law, and Congress were about to adopt legislative provisions for its protection, would they have used this language? Could they have deemed it necessary to vest a right already vested? Such a presumption is refuted by the words above quoted, and their force is not lessened by any other part of the Act.

Congress then, by this Act, instead of sanctioning an existing right, as contended for, created it. This seems to be the clear import of the law, connected with the circumstances under which it was enacted.

From these considerations it would seem that if the right of the complainants can be sustained, it must be sustained under the Acts of Congress. Such was, probably, the opinion of the counsel who framed the bill, as the right is asserted under the statutes, and no particular reference is made to it as existing at common law. The claim, then, of the complainants must be examined in reference to the statutes under which it is asserted.

There are but two statutes which have a bearing on this subject; one of them has already been named, and the other was passed the 29th of April, 1802.

The first section of the Act of 1790 provides, that an author or his assignee "shall have the sole right and liberty of printing, reprinting, publishing, and vending such map, chart, book or books, for the term of fourteen years, from the recording of the title thereof in the clerk's office, as hereinafter directed: and that the author, etc., in books not published, etc., shall have the sole right and liberty of printing, reprinting, publishing, and vending such map, chart, book, or books for the like term of fourteen years, from the time of recording the title

thereof in the clerk's office as aforesaid. And at the expiration of the said term, the author, etc., shall have the same exclusive right continued to him, etc., for the further term of fourteen years: provided he or they shall cause the title thereof to be a second time recorded, and published in the same manner as is hereinafter directed, and that within six months before the expiration of the first term of fourteen years."

The third section provides, that "no person shall be entitled to the benefit of this Act, etc., unless he shall first deposit, etc., a printed copy of the title in the clerk's office, etc." "And such author or proprieter shall, within two months from the date thereof, cause a copy of said record to be published in one or more of the newspapers printed in the United States for the space of four weeks."

And the fourth section enacts that "the author, etc., shall, within six months after the publishing thereof, deliver or cause to be delivered to the secretary of State a copy of the same, to be preserved in his office."

The first section of the Act of 1802 provides that "every person who shall claim to be the author, etc., before he shall be entitled to the benefit of the Act entitled an Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the time therein mentioned, he shall, in addition to the requisites enjoined in the third and fourth sections of said Act, if a book or books, give information by causing the copy of the record which by said Act he is required to publish, to be inserted in the page of the book next to the title."

These are subsequently the provisions by which the complainants' right must be tested. They claim under a renewal of the term, but this necessarily involves the validity of the right under the first as well as the second term. In the language of the statute, the "same exclusive right" is continued the second term that existed the first.

It will be observed that a right accrues under the Act of 1790 from the time a copy of the title of the book is deposited in the clerk's office. But the Act of 1802 adds another requisite to the accruing of the right, and that is, that the record

made by the clerk shall be published in the page next to the title-page of the book.

And it is argued with great earnestness and ability that these are the only requisites to the perfection of the complainants' title. That the requisition of the third section to give public notice in the newspapers, and that contained in the fourth to deposit a copy in the department of State, are acts subsequent to the accruing of the right, and whether they are performed or not, cannot materially affect the title.

The case is compared to a grant with conditions subsequent, which can never operate as a forfeiture of the title. It is said also that the object of the publication in the newspapers and the deposit of the copy in the department of State was merely to give notice to the public; and that such acts, not being essential to the title, after so great a lapse of time, may well be presumed. That if neither act had been done, the right of the party having accrued before either was required to be done, it must remain unshaken.

This right, as has been shown, does not exist at common law—it originated, if at all, under the Acts of Congress. No one can deny that when the Legislature are about to vest an exclusive right in an author or an inventor, they have the power to prescribe the conditions on which such right shall be enjoyed; and that no one can avail himself of such right who does not substantially comply with the requisitions of the law.

This principle is familiar, as it regards patent rights; and it is the same in relation to the copyright of a book. If any difference shall be made, as it respects a strict conformity to the law, it would seem to be more reasonable to make the requirement of the author rather than the inventor.

The papers of the latter are examined in the department of State, and require the sanction of the attorney-general; but the author takes every step on his own responsibility, unchecked by the scrutiny or sanction of any public functionary.

The acts required to be done by an author to secure his right are in the order in which they must naturally transpire. First, the title of the book is to be deposited with the clerk, and the record he makes must be inserted in the first or second page; then the public notice in the newspapers is to be given; and

within six months after the publication of the book, a copy must be deposited in the department of State.

A right undoubtedly accrues on the record being made with the clerk, and the printing of it as required; but what is the nature of that right? Is it perfect? If so, the other two requisites are wholly useless.

How can the author be compelled either to give notice in the newspapers or deposit a copy in the State department? The statute affixes no penalty for a failure to perform either of these acts; and it provides no means by which it may be enforced.

But we are told they are unimportant acts. If they are indeed wholly unimportant, Congress acted unwisely in requiring them to be done. But whether they are important or not is not for the Court to determine, but the Legislature; and in what light they were considered by the Legislature we can learn only by their official acts.

Judging then of these acts by this rule, we are not at liberty to say they are unimportant and may be dispensed with. They are acts which the law requires to be done, and may this Court dispense with their performance?

But the inquiry is made, shall the non-performance of these subsequent conditions operate as a forfeiture of the right?

The answer is, that this is not a technical grant of precedent and subsequent conditions. All the conditions are important; the law requires them to be performed; and, consequently, their performance is essential to a perfect title. On the performance of a part of them, the right vests; and this was essential to its protection under the statute; but other acts are to be done unless Congress have legislated in vain to render the right perfect.

The notice could not be published until after the entry with the clerk, nor could the book be deposited with the secretary of State until it was published. But these are acts not less important than those which are required to be done previously. They form a part of the title, and until they are performed the title is not perfect.

The deposit of the book in the department of State may be important to identify it at any future period should the copy-

right be contested or an unfounded claim of authorship asserted.

But, if doubts could be entertained whether the notice and deposit of the book in the State department were essential to the title under the Act of 1790, on which Act my opinion is principally founded, though I consider it in connection with the other Act; there is, in the opinion of three of the Judges, no ground for doubt under the Act of 1802. The latter Act declares that every author, etc., before he shall be entitled to the benefit of the former Act, shall, "in addition to the requisitions enjoined in the third and fourth sections of said Act, if a book, publish," etc.

Is not this a clear exposition of the first Act? Can an author claim the benefit of the Act of 1790 without performing "the requisites enjoined in the third and fourth sections of it?" If there be any meaning in language, the Act of 1802, the three Judges think, requires these requisites to be performed "in addition" to the one required by that Act, before an author, etc., "shall be entitled to the benefit of the first Act."

The rule by which conditions precedent and subsequent are construed in a grant, can have no application to the case under consideration, as every requisite in both Acts is essential to the title.

A renewal of the term of fourteen years can only be obtained by having the title-page recorded with the clerk, and the record published on the page next to that of the title, and public notice given within six months before the expiration of the first term.

In opposition to the construction of the above statute, as now given, the counsel for the complainants referred to several decisions given in England on the construction of the Statute of 8 Anne and other statutes.

In the case of Beckford *v.* Hood, 7 Term Rep. 620, the Court of King's Bench decided, "that an author, whose work is printed before the expiration of twenty-eight years from the first publication of it, may maintain an action on the case for damages against the offending party, although the work was not entered at Stationers Hall." But this entry was necessary only to subject the offender to certain penalties provided in the

Statute of 8 Anne. This suit brought was not for the penalties, and, consequently, the entry of the work at Stationers Hall was not made a question in the case. In the case of Blackwell *v.* Harper, 2 Atk. 95, Lord Hardwicke is reported to have said upon the Act of 8 Anne, c. 19, "the clause of registering with the stationers company is relative to the penalty, and the property cannot vest without such entry;" for the words are, "that nothing in this Act shall be construed to subject any bookseller, etc., to the forfeitures, etc., by reason of printing any book, etc., unless the title to the copy of such book, hereafter published, shall, before such publication, be entered in the register book of the company of stationers."

The very language quoted by his lordship shows that the entry was not necessary to an investiture of the title, but to the recovery of the penalties provided in the Act against those who pirated the work.

His lordship decided in the same case that "under an Act of Parliament, providing that a certain inventor shall have the sole right and liberty of printing and reprinting certain prints for the term of fourteen years, and to commence from the day of first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints," the property in the prints vests absolutely in the engraver, "though the day of publication is not mentioned."

The authority of this case is seriously questioned in the case of Newton *v.* Cowie, 4 Bingham, 241. And it would seem, from the decision of Lord Hardwicke, that he had doubts of the correctness of the decision, as he decreed an injunction without by-gone profits. And Lord Alvanly, in the case of Harrison *v.* Hogg, cited in 4 Bing. 242, said "that he was glad he was relieved from deciding on the same Act, as he was inclined to differ from Lord Hardwicke."

By a reference to the English authorities in the construction of statutes somewhat analogous to those under which the complainants set up their right, it will be found that the decisions often conflict with each other; but it is believed that no settled construction has been given to any British statutes in all respects similar to those under consideration, which is at

variance with the one now given. If, however, such an instance could be found, it would not lessen the confidence we feel in the correctness of the view which we have taken.

The Act of Congress under which Mr. Wheaton, one of the complainants, in his capacity of reporter, was required to deliver eighty copies of each volume of his reports to the department of State, and which were, probably, faithfully delivered, does not exonerate him from the deposit of a copy under the Act of 1790. The eighty volumes were delivered for a different purpose; and cannot excuse the deposit of the one volume as specially required.

The construction of the Acts of Congress being settled, in the further consideration of the case it would become necessary to look into the evidence and ascertain whether the complainants have not shown a substantial compliance with every legal requisite. But on reading the evidence we entertain doubts which induce us to remand the cause to the Circuit Court where the facts can be ascertained by a jury.

And the cause is accordingly remanded to the Circuit Court with directions to that Court to order an issue of facts to be examined and tried by a jury at the bar of said Court upon this point, viz., whether the said Wheaton as author or any other person as proprietor, had complied with the requisites prescribed by the third and fourth sections of the said Act of Congress, passed the 31st day of May, 1790, in regard to the volumes of Wheaton's Reports in the said bill mentioned, or in regard to one or more of them in the following particulars, viz., whether the said Wheaton or proprietor did, within two months from the date of the recording thereof in the clerk's office of the district Court, cause a copy of the said record to be published in one or more of the newspapers printed in the resident States for the space of four weeks; and whether the said Wheaton or proprietor after the publishing thereof, did deliver or cause to be delivered to the secretary of State of the United States, a copy of the same to be preserved in his office, according to the provisions of the third and fourth sections of the said Act.

And if the said requisites have not been complied with in regard to all the said volumes, then the jury to find in particular

in regard to what volumes they or either of them have been so complied with.

It may be proper to remark that the Court are unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this Court, and that the Judges thereof cannot confer on any reporter any such right.

DARLINGTON, P. P. p. 192; 8 Wheaton, Appendix No. 2.
1 Schouler, P. P. 535;

ALIENS.

"It hath been said that anybody may seize to his own use such goods as belong to an alien enemy. 2 Blackstone, 401.

Mrs. Alexander's Cotton.

Supreme Court of the United States, 1864.

2 Wallace, 404.

The Chief Justice delivered the opinion of the Court.

This controversy concerns seventy-two bales of cotton captured in May, 1864, on the plantation of Mrs. Elizabeth Alexander, on the Red River, by a party sent from the Ouachita, a gunboat belonging to Admiral Porter's expedition. The United States insist on the condemnation of the cotton as lawful maritime prize. Mrs. Alexander claims it as her private property. The facts may be briefly stated.

In the spring of 1864, a naval force of the United States, under Rear Admiral Porter, co-operating with a military force on land, under Major-General Banks, proceeded up Red River towards Shreveport, in Louisiana. The whole region at the time was in rebel occupation, and under rebel rule. Fort De Russy, about midway between the mouth of the river and Alexandria, was captured by the Union troops about the middle of March. The insurgent troops gradually retired until a considerable district of country on Red River came under the control of the national forces. This control, however, was of brief continuance. An unexpected reverse befell the expedition. The army under General Banks was defeated, and was soon after entirely withdrawn from the Red River country. The naval force, under Admiral Porter, necessarily followed, and rebel rule and ascendency were again complete and abso-

lute. The military occupation by the Union troops lasted rather less than eight weeks. Its duration was measured by the time required for the advance and retreat of the army and navy. The Parish of Avoyelles was a part of the district thus temporarily occupied; and the plantation of Mrs. Alexander was in this Parish, and upon the river. The seventy-two bales of cotton in controversy were raised on the plantation, and were stored in a warehouse about a mile from the river bank. A party from the Ouachita, under orders from the naval commander, landed on the plantation about the 26th of March, and took possession of the cotton. It was sent to Cairo; libelled as prize of war in the District Court for the Southern District of Illinois; claimed by Mrs. Alexander; and, by decree of the District Court, restored to her. The United States now ask for the reversal of this decree, and the condemnation of the property as maritime prize.

After the seizure of the cotton, Mrs. Alexander took the oath required by the President's proclamation of amnesty. The evidence in relation to her previous personal loyalty is somewhat conflicting. She had furnished mules and slaves, involuntarily as alleged, to aid in the construction of the rebel Fort De Russy. She now remains in the rebel territory. Before the retreat of the Union troops, elections are stated to have been held, under military auspices, for delegates to a constitutional convention about to meet in New Orleans.

These facts present the question: Was this cotton lawful maritime prize, subject to the prize jurisdiction of the Courts of the United States?

There can be no doubt, we think, that it was enemies' property. The military occupation by the national military forces was too limited, too imperfect, too brief, and too precarious to change the enemy relation created for the country and its inhabitants by three years of continuous rebellion; interrupted, at last, for a few weeks; but immediately renewed, and ever since maintained. The Parish of Avoyelles, which included the cotton plantation of Mrs. Alexander, included also Fort De Russy, constructed in part by labor from the plantation. The rebels reoccupied the fort as soon

as it was evacuated by the Union troops, and have since kept possession.

It is said that, though remaining in rebel territory, Mrs. Alexander has no personal sympathy with the rebel cause, and that her property, therefore, cannot be regarded as enemy property; but this Court cannot inquire into the personal character and dispositions of individual inhabitants of enemy territory. We must be governed by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States must be regarded as enemies, until by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed.

We attach no importance, under the circumstances, to the elections said to have been held for delegates to the constitutional convention.

Being enemies' property, the cotton was liable to capture and confiscation by the adverse party: Prize Cases, 2 Black. 687. It is true that this rule, as to property on land, has received very important qualifications from usage, from the reasonings of enlightened publicists, and from judicial decisions. It may now be regarded as substantially restricted "to special cases dictated by the necessary operation of the war:" 1 Kent, 92; and as excluding, in general, "the seizure of the private property of pacific persons for the sake of gain:" Id. 93. The commanding general may determine in what special cases its more stringent application is required by military emergencies; while considerations of public policy and positive provisions of law, and the general spirit of legislation, must indicate the cases in which its application may be properly denied to the property of non-combatant enemies.

In the case before us, the capture seems to have been justified by the peculiar character of the property and by legislation. It is well known that cotton has constituted the chief reliance of the rebels for means to purchase the munitions of war in Europe. It is matter of history, that rather than permit it to come into the possession of the national troops, the rebel government has everywhere devoted it, however owned, to

destruction. The value of that destroyed at New Orleans, just before its capture, has been estimated at eighty millions of dollars. It is in the record before us, that on this very plantation of Mrs. Alexander, one year's crop was destroyed in apprehension of an advance of the Union forces. The rebels regard it as one of their main sinews of war; and no principle of equity or just policy required, when the national occupation was itself precarious, that it should be spared from capture and allowed to remain, in case of the withdrawal of the Union troops, an element of strength to the rebellion.

And the capture was justified by legislation as well as by public policy. The Act of Congress to confiscate property used for insurrectionary purposes, approved August 6, 1861, declares all property employed in aid of the rebellion, with consent of the owners, to be lawful subject of prize and capture wherever found: 12 Stat. at Large, 319. And it further provided, by the Act to suppress insurrection, and for other purposes, approved July 17, 1862: Id. 591; that the property of persons who had aided the rebellion, and should not return to allegiance after the President's warning, should be seized and confiscated. It is in evidence that Mrs. Alexander was a rebel enemy at the time of the enactment of this Act; that she contributed to the erection of Fort De Russy, after the passage of the Act of July, 1862, and so comes within the spirit, if not within the letter, of the provisions of both.

If, in connection with these Acts, the provisions of the Captured and Abandoned Property Act of March 12, 1863: Id. 820; be considered, it will be difficult to conclude that the capture under consideration was not warranted by law. This last-named act evidently contemplated captures by the naval forces distinct from maritime prize; for the Secretary of the Navy, by his order of March 31, 1863, directed all officers and sailors to turn over to the agents of the Treasury department all property captured or seized in any insurrectionary district, excepting lawful maritime prize: Report of the Secretary of the Treasury on the Finances, December 10, 1863, p. 438.

Were this otherwise, the result would not be different, for Mrs. Alexander, being now a resident in enemy territory, and in law an enemy, can have no standing in any Court of the

United States so long as that relation shall exist. Whatever might have been the effect of the amnesty, had she removed to a loyal State after taking the oath, it can have none on her relation as enemy voluntarily resumed by continued residence and interest.

But this reasoning, while it supports the lawfulness of the capture, by no means warrants the conclusion that the property captured was maritime prize. We have carefully considered all the cases cited by the learned counsel for the captors, and are satisfied that neither of them is an authority for that conclusion. In no one of these cases does it appear that private property on land was held to be maritime prize; and on the other hand, we have met with no case in which the capture of such private property was held unlawful except that of Thorshaven: Edwards, 107. In this case such a capture was held unlawful, not because the property was private, but because it was protected by the terms of a capitulation. The rule in the British Court of Admiralty seems to have been that the court would take jurisdiction of the capture, whether of public or private property; and condemn the former for the benefit of the captors, under the Prize Acts of Parliament, but retain the latter till claimed, or condemn it to the Crown, to be disposed of as justice might require. But it is hardly necessary to go into the examination of these English adjudications, as our own legislation supplies all needed guidance in the decision of this case.

There is certainly no authority to condemn any property as prize for the benefit of the captors, except under the law of the country in whose service the capture is made; and the whole authority found in our legislation is contained in the Act for the better government of the navy, approved July 17, 1862. By the second section of the Act: 12 Stat. at Large, 606; it is provided that the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall be the sole property of the captors, or, in certain cases, divided equally between the captors and the United States. By the twentieth section, all provisions of previous acts inconsistent with this act are repealed. This act excludes property on land from category of prize for the benefit of

captors; and seems to be decisive of the case so far as the claims of captors are concerned.

As a case of lawfully captured property, not for the benefit of captors, its disposition is controlled by the laws relating to such property. By these laws and the orders under them, all officers, military and naval, and all soldiers and sailors, are strictly enjoined, under severe penalties, to turn over any such property which may come to their possession to the agents of the Treasury Department, and these agents are required to sell all such property to the best advantage, and pay the proceeds into the National Treasury. Any claimant of the property may, at any time within two years after the suppression of the rebellion, bring suit in the Court of Claims, and on proof of ownership of the property, or of title to the proceeds, and that the claimant has never given aid or comfort to the rebellion, have a decree for the proceeds, deducting lawful charges. In this war, by this liberal and beneficent legislation, a distinction is made between those whom the rule of international law classes as enemies. All who have in fact maintained a loyal adhesion to the Union are protected in their rights to captured as well as abandoned property.

It seems that in further pursuance of the same views, by an Act of the next session, Congress abolished maritime prize on inland waters, and required captured vessels and goods on board, as well as all other captured property, to be turned over to the Treasury agents or to the proper officers of the Courts. This Act became a law a few weeks after the capture now under consideration, and does not apply to it. It is cited only in illustration of the general policy of legislation to mitigate, as far as practicable, the harshness of the rules of war, and preserve for loyal owners, obliged by circumstances to remain in rebel States, all property, or its proceeds, to which they have just claims, and which may in any way come to the possession of the Government or its officers.

We think it clear that the cotton in controversy was not maritime prize, but should have been turned over to the agents of the Treasury Department, to be disposed of under the Act of March 12, 1863. Not having been so turned over, but having been sold by order of the District Court, its proceeds should now

be paid into the Treasury of the United States, in order that the claimant when the rebellion is suppressed, or she has been able to leave the rebel region, may have the opportunity to bring her suit in the Court of Claims, and, on making the proof required by the Act, have the proper decree.

The decree of the District Court is reversed, and the cause remanded, with directions to

Dismiss the libel.

DARLINGTON, P. P. p. 96; The Prize Cases, 2 Black. 635; Coppell *v.* Hall, 7 Wallace, 542; McKee *v.* U. S., 8 Wallace, 163; U. S. *v.* Grossmayer, 9 Wallace, 72; Kershaw *v.* Kelsey, 100 Mass. 570; Mut. Ben. Life Ins. Co. *v.* Hillyard, 37 N. J. L. 444.

PREROGATIVE.

The common law regarding title by *Prerogative*, *Forfeiture*, *Custom*, *Succession*, and *Marriage* has been either abolished or is so modified by the laws of the different States that a citation of cases regarding them is not deemed advisable.

JUDGMENT.

Title may be acquired by a judgment and a satisfaction thereof.

SMITH *v.* SMITH.

Supreme Judicial Court of N. H., 1872.

51 N. H. 571.

If a judgment is recovered against the defendant for the conversion of chattels, when the judgment is satisfied the title to said chattels vests in the defendant as from the time of conversion.

LADD, J. The agreed statement of facts upon which the former opinion in this case was rendered (50 N. H. 212), showed that after this plaintiff had paid the judgment recovered against him for the original taking of the post, etc., this defendant entered upon the plaintiff's premises and carried them away again. The defendant now offers to prove that his taking was *before* that judgment was paid, though after it was rendered; and we are called on to decide that the plaintiff cannot recover the value of the property which he thus paid for in paying that judgment, because it was taken from him by the defendant before instead of after the payment.

The defendant's position, in a word, is this: he had changed

his security for the conversion of the property from an unliquidated claim for damages for a tort into a judgment for its value. Without releasing or surrendering that judgment, he broke and entered the plaintiff's close and took away the property for which he held the judgment; and having thus secured the property, he enforced payment for its value by collecting the judgment. He now claims that he is not liable for its value in this action, because the property did not pass to the defendant until the judgment was paid, that is, after his taking.

If there were no other way of meeting this position, it would doubtless furnish a strong argument in favor of the former doctrine, that it is the judgment and not the satisfaction which passes the property: Adams *v.* Broughton, 2 Stra. 1078; and see cases collected in Buckland *v.* Johnson, 15 C. B. 145. Such is not the law, however, in this State: Hyde *v.* Noble, 13 N. H. 494, and probably not now in England: Brimsmead *v.* Harrison, Law Reps., 6 C. P. 584; S. C. Law Rep., 7 C. P. 547, and the aid of no such doctrines need be invoked.

In the former opinion it was said that a satisfaction of the judgment by this plaintiff passed the title of the property to him to take effect by relation from the time of the conversion.

That remark was not strictly called for as the case then stood; but we have no doubt it was correct, and it fully meets the case as now presented: 2 Par. Bills and Notes, 436; 1 Hilliard on Torts, 51; Buckland *v.* Johnson, *supra;* Hepburn *v.* Sewell, 5 Har. & Johns. (Md.) 211. In the latter case the point was directly raised and distinctly decided by the Court. The remarks of Dorsey, J., in delivering the judgment of the Court, are so much in point that I quote a portion of them. He says: "It must be borne in mind that the plaintiff, in an action of trover, compels the defendant to become a purchaser against his will; and from what period does he elect to consider the defendant as a purchaser, or as answerable to him for the value of the thing converted? He selects the date of conversion as the epoch of the defendant's responsibility and claims from him the value of the property at that period, with interest to the time of taking the verdict. The inchoate right of the defendant as a purchaser must therefore be considered as coeval with the period of conversion, and this right being consummated by

the judgment and its discharge, must, on legal and equitable principles, relate back to its commencement."

This view disposes of the defendant's case; for if, upon payment of the judgment, the property in the posts, etc., passed absolutely to the plaintiff, and his title thereupon took effect by relation from the date of the conversion, he is clearly entitled to recover their value in the present suit.

We do not undertake to say that there may not be cases where this doctrine would not apply. All we decide is, that it does apply in a case like the present.

Freeman on Judgments, § 237.

Satisfaction of judgment is necessary to vest title.

SPIVEY *v.* MORRIS.

Supreme Court of Alabama, 1850.

18 Alabama, 254.

CHILTON, J. The question in this case is, whether a recovery in an action of trover by the plaintiff against one party, but without execution upon, or satisfaction of the judgment, is a bar to an action of the same kind brought by the plaintiff against a person claiming under the defendant to the former judgment. There is certainly most respectable authority on both sides of this question. That a judgment in trover for the value of the property amounts to an investiture of title in the defendant is decided in Brown *v.* Watton, Cro. Jac. 43; Adams *v.* Broughton, Andrews's Rep. 18; s. c., Stra. 1070; Murrel *v.* Johnson, 1 H. & Munf. 450; Floyd *v.* Browne, 1 Rawle, 121; 4 Ib. 285, and Foreman *v.* Neilson, 2 Rich. Eq. R. 287; and the law is similarly laid down by Mr. Chitty in his work on pleading, 76, and in 3 Dane's Abr. c. 77, Art. 1, § 2; see also 5 Eng. Com. Law, 422, and 3 Stark's Ev. 1281; Wright *v.* Walton, 2 Hayw. 16. On the other hand, the following cases hold that there must be a satisfaction, in order to vest the title to the chattel in the defendant: Morton's Case, Coke's Eliz. 30; Ortertrout *v.* Roberts, 8 Cow. R. 43; Hepburn *v.* Seawell,

5 H. & Johns. 211; Morris *v.* Berkley, 2 Rep. Cons. Ct. 228; Curtis *v.* Goat, 6 Johns. 168; Sanderson *v.* Caldwell, 2 Aik. 195; Hopkins *v.* Horsey, 20 Maine R. 449, and this view of the law is sustained by Sergeant Williams, 2 Saund. 148 *b*; by Shep. Touchstone, title, Gift; and by Chancellor Kent, 2 Com. 387. It seems also, to be the doctrine of the Civil and French law, Dig. 6 *l*; 35, 63; *Pothier*, *Traité Droit propriété*, No. 364. See also Jones *v.* McNeill *et al.*, 2 Bail. R. 466, where it is said if the recovery in trover operates as a sale it is by implication of law, and that implication can only arise from satisfaction of the value found. See to the same point Drake *v.* Mitchell, 3 East. 251, per Lord Ellenborough, cited in 2 Kinne's Compend. 19, where it is said, "it seems the better opinion that a judgment without satisfaction does not change the property." This is not the case of separate suits against joint tort feasers, but the tort is several, and we have no hesitation in pronouncing that to constitute a bar to this action, the former judgment against Oden must have been satisfied. Until then, no property vested in Oden, and consequently he could transmit none to the defendant in this case. This conclusion accords with the justice of the case, and we think harmonizes with the general principle in the law, which forbids that a clear and acknowledged right of action, once vested, should be destroyed except by release under seal, or something given in satisfaction of the wrong. The Circuit Court held the former judgment a bar. It erred. Let the judgment be reversed and the cause remanded.

GIFT.

Title to chattels may be acquired by gift.

DeLevillain *v.* Evans.

Supreme Court of California, 1870.

39 Cal. 120.

Crockett, J., delivered the opinion of the Court.

This is an action in the usual form, by the heirs-at-law of Francis Soto, deceased, to recover a lot in San Francisco, and the answer contains a general denial, coupled with an averment of title in the defendants. The plaintiff's claim of title is founded on a deed of gift from John Evans (then the owner of the property) to Francis Soto, made in December, 1849, and recorded on the day of its date in the office of the alcalde. At the time of the execution of the deed, Soto, the grantee, was a minor, twelve or fifteen years of age, residing with his father in a tent on an adjoining lot. In 1851 or 1852, the grantee went to the mines, and died in 1856. The descriptive part of the deed is as follows: "All my right, title, and interest in and to a certain parcel of land situated in the town of San Francisco, outside of the town survey, being block No. 9, the same on which I now reside. The part thus donated to Francis Soto, commences at the northeast corner of said block No. 9, running twenty-five veras west from said northeast corner, thence back one hundred veras."

The chief objections urged by the defendants against this as a valid and operative conveyance, are: First. That it is void for uncertainty in the description of the property granted. Second. That, under the Mexican or civil law then in force, a donation was void, unless it was accepted by the donee in his lifetime, and that the proof does not show any acceptance by Soto; and that, if it did, being a minor, he was incapable in law, of making a valid acceptance.

The first point, we think, is not well taken. It is perfectly obvious on the face of the instrument that Evans did not intend to convey the whole of block No. 9, but only a "part" thereof; and he defines the part granted as commencing at the northeast corner of the block, and "running twenty-five veras west from said northeast corner; thence back one hundred veras." We think there is no difficulty in locating the lot from this description; and that commencing at said corner, it was to run westerly twenty-five veras to the northerly line of the block and thence southerly at right angles one hundred veras, with a uniform width of twenty-five veras. It was manifestly intended to be a strip off the easterly side of the block, twenty-five veras wide and one hundred veras deep, from the northerly line of the block. The description is sufficiently certain to support the deed.

In respect to the question of acceptance by the donee, as we understand this civil law, it does not differ materially from the common law. Under neither is the donation valid and obligatory until it is accepted. It may be that the donee does not desire to have the property. There may be burdens growing out of the ownership which he does not choose to assume. If he affirmatively declines to accept the donation, the law does not force it upon him against his will. This must be so upon every principle of reason and justice. Nevertheless, in the case of an adult donee, if the donation is for his advantage, he will be presumed to have accepted it unless the contrary appears. In the case of a minor who is presumed in law to be incapable of exercising a sound discretion over his affairs, and is, therefore, not bound by his contracts, unless in exceptional cases, there is the greater reason for presuming that he has accepted what is for his advantage. In other words, if it for his advantage, the law accepts it for him and will hold the donor bound; but, if not for his advantage, the law will repudiate it at the instance of the minor, even though he may in terms have accepted it.

In this respect we understand the rule at common law and under the civil law to be the same: Donner *v.* Palmer, 31 Cal. 500.

Nothing appears in the record to justify the inference that

this donation was not for the advantage of the donee; and no reason is perceived why he would not be benefited by becoming the owner of so considerable lot in a growing city. For these reasons we think the deed was operative to convey the title.

Judgment reversed, and new trial ordered.

KELLOGG *v.* ADAMS.

Supreme Court of Wisconsin, 1881.

51 Wis. 138.

ORTON, J. The testimony as to what was said by the plaintiff and her daughter, Ida, in respect to the gift and possession of the piano was proper in connection with and as explaining their possession of the instrument, after its purchase by the mother and its gift to the daughter. What is said by the person in the posession of property, explanatory of such possession, is a part of the *res gestæ*. This is an elementary rule of evidence: 1 Greenl. on Ev. sec. 109. The other objections to evidence were solely on the ground of its immateriality; and if the evidence was immaterial, it would not be likely to affect the verdict, and its admission constitutes no ground for the reversal of the judgment.

On the instructions to the jury, the question is raised, whether O. W. Kellogg, the mortgager and father of Ida, could make to her a valid and irrevocable gift while she was a minor and member of his family. In order to raise this question it must be assumed that the gift by the mother was in fact and in law, the gift of the father; for the mother has not sought its revocation. This gift is not sought to be avoided by the existing creditors of Kellogg, the father, as having been made in contravention of their rights, but by a subsequent mortgagee of the father, on the ground that the giving of the mortgage was a revocation of the gift. Most of the questions here raised were, in principle, recently decided by this Court, in the unreported case of Wanebold *v.* Vick, referred to by counsel, and such a gift was held valid. In that case the father gave to his minor son his time and services by means of which the son purchased a piano and then gave it to his sister. It is creditable to the father, in that case, that he did not himself seek to

revoke or defeat his gift. In Knaggs *v.* Green, 48 Wis. 601, the validity of a similar gift to an infant is recognized.

It may be difficult to prove an actual delivery and change of possession in such case of gift between members of the same family, when the presumption in all cases is strongly in favor of the continued posession of the father as the head of the family; but it is not impossible, and when such a gift by the father to his child is fully executed by a delivery, it will be upheld. The case of Pierson *v.* Heisey, 19 Iowa, 114, is strongly in point, and nearly parallel in its facts as to the parties, the subject and the circumstances of the gift. See also, Schouler's Pers. Prop. 85; Kerrigan *v.* Rantigan, 43 Conn. 17, and other cases cited in brief of counsel. There may be authorities which hold that such a gift may be revoked, but they have not the weight of reason. It is so much more consistent with natural feeling, manly honor, and paternal affection and fidelity, to uphold such a gift, and prevent a father from doing such an unworthy act as taking back his gift to his child, that we the more readily approve of those authorities which hold that it cannot be done.

The charge of the Court was strongly in favor of the plaintiff, but no stronger the facts seemed to warrant, and, on the whole, presented the case fairly to the jury. The plaintiff being in the possession of the property, and the defendant having taken it away without right, the plaintiff was entitled to recover: Javes *v.* Van Duyn, 45 Wis. 512.

By the Court. The judgment of the Circuit Court is affirmed, with costs.

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